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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 130

HARRY B. MITCHELL, FRANCES PERKINS, ARTHUR S. FLEMMING, INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, PETITIONERS

vs.

JACK W. COHEN

No. 131

HARRY B. MITCHELL, FRANCES PERKINS, ARTHUR S. FLEMMING, INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, PETITIONERS

vs.

HARRY W. RUBICKEY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITIONS FOR CERTIORARI FILED JUNE 13, 1947
CERTIORARI GRANTED OCTOBER 13, 1947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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VS.

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No. 131

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VS.

HARRY W. HUBICKEY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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1 In the District Court of the United States for the District of Columbia

Civil Action File No. 34267

JACK W. COHEN, 7 N. RESEARCH ROAD, GREENBELT, MD., PLAINTIFF

v.

HARRY B. MITCHELL, 7TH AND F STREETS NW., WASHINGTON, D. C.; LUCILLE FOSTER MCMILLIN, 7TH AND F STREETS NW., WASHINGTON, D. C.; ARTHUR S. FLEMMING, 7TH AND F STREETS NW., WASHINGTON, D. C., DEFENDANTS

Complaint for injunction and declaratory relief

Filed April 12, 1946

To The Honorable Justices of the District Court of the United States for the District of Columbia:

1. Jurisdiction founded on the existence of a federal question. This action involves the Veterans' Preference Act of 1944, 58 Stat. 387; U. S. C. Title 5, § 851, as hereinafter more fully appears.

2. Plaintiff is a citizen of the United States, domiciled in New York City, New York, and presently residing at 7 North Research Road, Greenbelt, Maryland.

2 3. Defendants are the members of the United States Civil Service Commission, and are sued both in their official and individual capacity. All of the defendants maintain their official residence within the District of Columbia. Defendants are charged with responsibility for the administration and enforcement of the provisions of the Veterans' Preference Act of 1944.

4. Defendants have refused to grant plaintiff the status of a preference eligible to which he is lawfully entitled as an ex-serviceman under the provisions of Sections 2 and 18 of the Veterans' Preference Act of 1944.

5. Plaintiff served on active duty as a member of the United States Coast Guard Reserve (Temporary), a branch of the armed forces of the United States during World War II, and was separated therefrom on September 5, 1945, under honorable conditions. The United States Coast Guard Reserve (Temporary) was created and functioned in accordance with the Coast Guard Auxiliary and Reserve Act of 1941, 55 Stat. 11, U. S. C., Title 14, § 301. Plaintiff enrolled as a member of The Coast Guard Reserve (Temporary) on April 13, 1944, with the rank of Seaman First Class, at which time he executed a form entitled "Temporary

Member of the Coast Guard Reserve—Enrollment and Active Duty Assignment," a true copy of said form being attached hereto and marked "Plaintiff's Exhibit One." Plaintiff continued to serve as a member of such Reserve on a part-time active duty assignment, without compensation, until September 5, 1945, at which time he was honorably disenrolled with the rank of Coxswain and presented with a "Certificate of Disenrollment," a true copy of said certificate being attached hereto and marked "Plaintiff's Exhibit Two."

3 Plaintiff was issued necessary uniform and equipment and received food and quarters while on active duty. At all times while on active duty, either traveling to or from such duty, or when wearing the uniform prescribed, plaintiff was subject to the laws, regulations, and orders for the government of the Coast Guard and was subject to disciplinary action for any offense committed thereunder.

6. Subsequent to his honorable disenrollment from active duty in the United States Coast Guard Reserve (Temporary), plaintiff applied, on or about September 25, 1945, to the United States Civil Service Commission for recognition as a preference eligible under the provisions of the Veterans' Preference Act of 1944, in accordance with the regulations and procedures of the Civil Service Commission on its prescribed Form 14 entitled "Veteran Preference Claim." Plaintiff was notified by the Civil Service Commission that his claim had been rejected for the reason that his service was in a civilian capacity. A true copy of this rejection, Civil Service Form 3593, is attached hereto and marked "Plaintiff's Exhibit Three."

7. Plaintiff was discharged from his position as a civilian economist, War Department, on October 10, 1945, as the result of a general reduction in force, notwithstanding his efficiency rating of excellent, and is informed and believes that this discharge would not have occurred had he had at that time the status of a preference eligible. Plaintiff is at present employed as an economist with the United Nations Relief and Rehabilitation Administration. Upon completion of certain work upon which he is now engaged, and prior to the end of the current year, he plans to reenter government service. The refusal of defendants to grant plaintiff the status of a preference eligible adversely and directly

4 affects plaintiff's opportunities for employment in the Government and the job classification for which he may be eligible. Plaintiff's opportunities for tenure, advancement, and reassignment following any subsequent employment by the Government will be adversely affected by the denial to him of the status of a preference eligible. Plaintiff has pursued whatever administrative remedies are available to him in seeking to

obtain a determination of his eligibility for status as a preference eligible, and is without other remedy than this action in seeking to have his rights in this regard determined.

8. On April 4, 1944, prior to the enactment of the Veterans' Preference Act of 1944, the United States Civil Service Commission issued Circular Letter No. 4145 to Regional Directors and Division Chiefs of the Commission, providing as follows:

C4145–1

"UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D. C.

APRIL 4, 1944.

XE: P: S.

"Circular Letter No. 4145 (Manual of Instructions)

Subject: Veteran Preference—United States Coast Guard Reserve,

Regional Directors, and Division Chiefs:

"The following information and instructions are forwarded for your attention and guidance, regarding the present active duty status of members of the United States Coast Guard Reserve.

"1. Active duty performed by members of the United States Coast Guard Reserve since February 19, 1941, the date of the approval of Public Law 8, 77th Congress, The Coast Guard Auxiliary and Reserve Act of 1941, is considered regular active duty as distinguished from training duty. Certificates of discharge from the United States Coast Guard Reserve showing (1) any active duty since February 19, 1941, and (2) honorable or satisfactory separation therefrom are acceptable as proof for preference and such certificates need not be referred to the central office.

"2. Public Law 8, 77th Congress, The Coast Guard Auxiliary and Reserve Act of 1941, made provisions for the enrollment of persons as temporary reservists. During the present war, active duty performed by the temporary members of the Coast Guard Reserve, whether full-time, part-time or intermittently, either with or without pay, including government employees enrolled without pay other than the compensation of their civilian positions, constitutes active service as distinguished from training duty. Membership in the Coast Guard Auxiliary, a nonmilitary organization, does not constitute membership in the armed forces. Many auxiliarists, however, are also enrolled as temporary members of the Coast Guard Reserve, and, in such cases, if they perform active duty, they are in the armed forces. Preference benefits are applicable to the temporary reservists who furnish proof of (1) active duty whether full-time, part-time, etc., and (2) honorable or satisfactory separation ich may be by

release, discharge or disenrollment. Such cases need not be forwarded to the central office unless doubtful in any important particular.

"3. Questions concerning this Circular Letter should be referred to the Preference Sub-Unit, Services Section, Examination & Personnel Utilization Division.

"By direction of the Commission:

L. A. MOYER, *Executive Director.*"

9. Some time in August 1944, following enactment of the Veterans' Preference Act of 1944, the United States Civil Service Commission issued a pamphlet entitled "From Military Service to Civil Service, Answers to Questions of Returning Servicemen and Servicewomen about Federal Employment," which stated that members of the Coast Guard Reserve (Temporary) who had been discharged under honorable conditions were considered members of the armed forces and as such entitled to the status of preference eligible.

10. On November 4, 1944, the United States Civil Service Commission issued the following circular:

"D508–1

"UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D. C.

NOVEMBER 4, 1944.

XE: HAP: kds.

"Departmental Circular No. 508

6 "Subject: Status of Members of the U. S. Coast Guard Reserve (Temporary) with Regard to Veteran Preference.

"*To Heads of Departments and Independent Establishments:*

"Members of the Coast Guard Reserve (Temporary) have been enrolled according to the following classifications:

(a) For active full-time duty with pay and allowances at shore stations or on Coast Guard vessels.

(b) For part-time or intermittent duty without pay and allowances other than for uniforms.

(c) Pilots without pay and allowances other than for uniforms.

(d) Officers of Great Lakes vessels without pay and allowances other than for uniforms.

(e) Coast Guard police without pay and allowances.

(f) Civil-service employees of the Coast Guard without pay other than compensation of their civilian positions.

"The Acting Secretary of the Navy has advised the Commission that only those members of the Coast Guard Reserve (Temporary) falling in classification (a) above, should be considered as naval veterans upon discharge.

"In view of the ruling of the Acting Secretary of The Navy, service in the Coast Guard Reserve (Temporary) may be used as a basis for the granting of veteran preference under the Veterans' Preference Act of 1944 only if such service was in classification (a), above, and other conditions necessary to the granting of veteran preference are present.

"The provisions of this circular are effective with respect to preference claims which have been granted, to pending claims, and to future claims.

"Questions concerning this circular may be addressed to the Civil Service Representative assigned to the Agency's Washington or field offices, or to the Examining and Personnel Utilization Division, Preference Sub-Unit, telephone extension 457 (Commission's Central Office), or to the appropriate regional or branch regional office of the Commission.

"By direction of the Commission:

Very respectfully,

L. A. MOYER,
Executive Director and Chief Examiner."

7 11. Defendants are without legal authority or discretion to make or enforce any rule or regulation which denies to plaintiff the status of a preference eligible under the Veterans' Preference Act of 1944. Defendants have acted contrary to the express terms and requirements of that Act in denying plaintiff such status. The action of the defendants in this regard is wholly arbitrary and discriminatory, depriving plaintiff of the rights and privileges conferred upon him by such Act to his immediate and continuing detriment.

Wherefore plaintiff demands judgment as follows:

1. That this court order defendants to classify plaintiff as a preference eligible under the Veterans' Preference Act of 1944, and thereafter to refrain from taking any action which will deny plaintiff such status.

2. That this court adjudge and declare that plaintiff, as a member of the United States Coast Guard Reserve (Temporary) who served during World War II and was separated therefrom under honorable conditions, is entitled to the status of a preference eligible under the provisions of the Veterans' Preference Act of 1944.

3. That plaintiff recover his costs.

4. That plaintiff have such other and further relief as is just.

GERHARD A. GESELL, *Attorney for Plaintiff.*
COVINGTON, BURLING, RUBLEE, ACHESON & SHORB,
701 Union Trust Building, Washington, D. C.

Exhibit One

TEMPORARY MEMBER OF COAST GUARD RESERVE

ENROLLMENT AND ACTIVE DUTY ASSIGNMENT

From Office of District Coast Guard Officer:

Naval District ..... City ..... State .....
Date .....

To ..... Rank or Rating .....

1. In accordance with the provisions of the Coast Guard Auxiliary and Reserve Act of 1941, as amended, and Coast Guard Reserve Regulations as amended, and subject to your acceptance and execution of the prescribed oath of office or oath of allegiance, you are hereby enrolled as a temporary member of the United States Coast Guard Reserve, with the rank or rating indicated above, USCGR, class T, from date of oath.

2. The period of your enrollment shall be for the duration of the war upon the completion of which you will be disenrolled unless the period of your enrollment is sooner terminated by Coast Guard authority.

3. You will perform such duties as may be prescribed from time to time by Coast Guard authority in the classification checked below:

1. ☐ Auxiliary members enrolled in class T.
2. ☐ Volunteer Port Security Force.
3. ☐ Enrolled for other volunteer duty, namely .....
4. ☐ Pilots.
5. ☐ Coast Guard Civil Service Employees.
6. ☐ Officers of Great Lakes Vessels.

You are authorized to wear the prescribed uniform only while on active duty and while en route to and from such duty. Members in classifications 1, 2, and 3 will be on active duty only as directed by competent authority for a minimum of 12 hours per week. They will not be subject to transfer without their consent. Members in classifications 4 and 5 will be on active duty and subject to call at all times. Members in classification 6 will be on active duty only during the open season of navigation on the Great Lakes.

4. Your military status as a member of the U. S. Coast Guard Reserve shall attach during periods when you are actually engaged on active duty or en route to and from such duty. In the performance of your duty as a temporary member of the United States Coast Guard Reserve, you are vested with the same power

and authority as members of the regular Coast Guard of similar rank, grade, or rating. You shall be subject to the laws, regulations, and orders for the government of the Coast Guard and to disciplinary action for offenses committed while subject thereto, in accordance with the provisions of Section 209 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended.

5. You will serve without pay and allowances (other than compensation of their civilian positions in the case of Government employees), except (1) such travel and subsistence allowances as may be specifically authorized and (2) uniform allowances of:

---

6. You are not by reason of enrollment as a temporary member of the Reserve exempt from registration and liability for training and service under the Selective Training and Service Act.

7. You will be entitled to the following benefits and privileges only: (a) In the case of physical injury in line of duty while performing active Coast Guard service, or death as a result of such physical injury, the benefits prescribed by law for civil employees of the United States, as administered by the United States Employees' Compensation Commission, to the extent that the same may be applicable. (b) In the case of sickness or disease contracted while performing active duty, the same hospital (including medical, but excluding dental) treatment as is afforded members of the regular Coast Guard. (c) Such other benefits and privileges as may be specifically authorized from time to time for temporary members of the Reserve or classifications thereof by law or regulations.

8. You are hereby ordered, upon acceptance of this enrollment and execution of the prescribed oath, to commence active duty at:

In accordance with the above terms and conditions, effective

Accepted _____. Date _____. Enrolling official (By Direction of the Commandant) _____.

Oath of Office (For Officers):

Having been enrolled as _____ (temporary) in the United States Coast Guard Reserve, I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So Help Me God. And I do further swear (or affirm) that I will

use my best endeavors to prevent and detect frauds against the laws of the United States imposing duties upon imports. So Help Me God.

Subscribed and Sworn to before me this _____ day of _____, 19__.

_____ _____
(*Signature and title*) United States Coast Guard Reserve (*Temporary*)

Oath of Allegiance (For Enlisted Men):

Having been enrolled as _____ (temporary) in the United States Coast Guard Reserve, I, _____, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the laws and regulations for the government of the United States Coast Guard.

Subscribed and sworn to before me this _____ day of _____, 19__.

_____ _____
(*Signature and title*) United States Coast Guard Reserve (*Temporary*)

Exhibit Two—Front-Page



10 *Exhibit Two—Back Page*

Enrolled as: Seaman 1c. 6175-260. On 13 April 1944 at Washington, D. C. Ratings held: Seaman 1c. Training Courses completed: Seaman Class and Military Training. Served on active duty for a total of forty-six (46) days. Rating at release Seaman 1c.

11 *Exhibit Three*

U. S. COAST GUARD RESERVE

VOLUNTEER PORT SECURITY FORCE

Part-time duty, without pay.

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D. C.

The Commission regrets to inform you that your claim for veteran preference cannot be given favorable consideration under the provisions of the Veterans' Preference Act of 1944 for the reason checked below:

----Service was not performed during a war or in a campaign or expedition for which a campaign badge was authorized.
----Veteran not receiving compensation, pension, or disability retirement benefits.
----Service-connected disability not established.
----Husband not disqualified for Civil Service appointment by reason of service-connected disability.
----Separation not honorable.
----No active duty in Armed Forces.
√ Service in civilian capacity.
----Service in training only.
----Divorced from veteran.
----Remarried after death of veteran.
----Preference not applicable to relatives of veterans. (Exceptions: Widows and wives—under certain conditions.)
----See note on other side.

Jack W. Cohen, 7 N. Research Road, Greenbelt, Md.

12 In the District Court of the United States

Civil Action No. 34267

[Title omitted.]
[File endorsement omitted.]

Answer

Filed June 25, 1946

For answer to the complaint filed in this cause defendants state as follows:

FIRST DEFENSE

1. Defendants admit the allegations of paragraphs 1, 2, 3, 5, 6, 8, 9, and 10 of the complaint.

2. Answering paragraph 4 of the complaint defendants admit that plaintiff was denied the status of a preference eligible, but aver that he was not entitled to such status under the provisions of the Veterans' Preference Act of 1944.

3. Answering paragraph 7 of the complaint, defendants admit the allegations thereof, except that they deny that plaintiff's discharge would not have occurred had he had at that time the status of a preference eligible, and except that defendants are without knowledge or information sufficient to form a belief concerning plaintiff's present employment with the United Nations Relief and Rehabilitation Administration and concerning plaintiff's plans to return to the Government service.

13 4. Defendants deny the allegations of paragraph 11 of the complaint.

SECOND DEFENSE

5. Plaintiff's part-time service as a temporary member of the Coast Guard Reserve did not constitute him an ex-serviceman who had served on active duty in a branch of the armed forces of the United States within the meaning of Section 2 of the Veterans' Preference Act of 1944.

THIRD DEFENSE

6. The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, defendants pray that the Complaint be dismissed and for such other and further relief to which they may be entitled.

John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General.

Edward M. Curran,
EDWARD M. CURRAN,
United States Attorney.

Daniel B. Maher,
DANIEL B. MAHER,
Assistant United States Attorney,
Attorneys for defendants.

I hereby certify that I have this 2d day of June, 1946, sent a copy of the foregoing answer, by official United States mail, to Covington, Burling, Rublee, Acheson & Shorb, Union Trust Building, Washington, D. C.

Daniel B. Maher,
DANIEL B. MAHER,
Assistant United States Attorney.

14 In the District Court of the United States

Civil Action File No. 34267

[Title omitted.]
[File endorsement omitted.]

Motion for summary judgment

Filed Sept. 9, 1946

Plaintiff moves the court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiff's favor for the relief demanded in the complaint, on the ground that there is no genuine issue as to any material fact and that the plaintiff is entitled to a judgment as a matter of law; or, in the alternative,

2. If summary judgment is not rendered in plaintiff's favor upon the whole case or for all the relief asked and a trial is necessary, that the court, at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and thereupon making an order specifying the facts
15 that appear without substantial controversy and directing such further proceedings in the action as are just.

This motion is based upon:

(a) The pleadings on file in this action.

(b) The affidavit of plaintiff annexed hereto as Exhibit A.

Wm. Merrick Parker,
WM. MERRICK PARKER,
Attorney for Plaintiff,
701 Union Trust Building, Washington, D. C.

16 *Exhibit "A" to motion*

In The District Court of The United States

Civil Action No. 34267

[Title omitted.]

Affidavit of Jack W. Cohen

CITY OF WASHINGTON,
District of Columbia, ss:

Jack W. Cohen, being sworn deposes and says that prior to October 10, 1945, he was employed as a civilian economist by the United States War Department and that on October 10, 1945 he was discharged as the result of a general reduction in force. Deponent further says that his efficiency rating at the time of his said discharge was that of excellent, and that he was informed by his superiors and others and he himself believes that he would not have been discharged at that time had he been given the status of a preference eligible.

Deponent further says that it is his present desire and intention to reenter the service of the United States Government and
17 that the refusal by defendants to grant deponent the status of a preference eligible adversely and directly affects plaintiff's opportunity for employment in the Government and the job classification for which he may be eligible, as well as his opportunity for tenure, advancement, and reassignment in Government service.

Deponent says that for these reasons the refusal by the defendants to grant him the status of a preference eligible to which he is entitled by law has caused and will in the future cause deponent irreparable injury.

JACK W. COHEN.

Subscribed and sworn to before me this 9 day of September, 1946.

HELEN HYMAWITZ,
Notary Public.

My commission expires Nov. 8, 1948.

18 In The District Court of The United States

Civil Action File No. 34267

[File endorsement omitted.]

Motion of defendants for summary judgment, notice of motion, and affidavits

Filed Sept. 27, 1946

The defendants, upon the pleadings herein, and upon the annexed affidavits, respectfully move the Court for summary judgment in favor of the defendants on the ground that there are no genuine issues as to any material fact and defendants are entitled to such judgment as a matter of law.

John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General,
Edward M. Curran,
EDWARD M. CURRAN,
United States Attorney,
Attorneys for the Defendants.

19 In the District Court of the United States

Civil Action File No. 34267

[Title omitted.]

Affidavit of Chester A. Anderson

Chester A. Anderson, Captain, United States Coast Guard, being first duly sworn, deposes and says:

1. That he is Chief, Reserve and Auxiliary Division, United States Coast Guard, of which the Temporary Reserve Section is a part. That in his capacity as Chief, Reserve and Auxiliary Division, United States Coast Guard, he has personal and official knowledge of the facts stated herein, excepting those stated upon information and belief, and as to facts so stated he verily believes them to be true.

2. That, pursuant to the authority set forth in Section 207 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended (14 U. S. C. Sec. 307), the Commandant, United States Coast Guard, undertook to enroll as temporary members of the Coast Guard Reserve approximately 70,000 persons for such duty as was prescribed in the various contracts of enrollment.

3. That, generally, persons who were enrolled as temporary members of the Coast Guard Reserve served in one of the following six classifications:

20 (a) For active full-time duty with military pay and allowances.

(b) For part-time or intermittent duty without pay and allowances other than for uniforms.

(c) Pilots without pay and allowances other than for uniforms but paid by their own companies.

(d) Officers of Great Lakes vessels without pay and allowances other than for uniforms but paid by their own companies.

(e) Coast Guard police without pay and allowances.

(f) Civil Service employees of the Coast Guard enrolled for full-time active duty without pay other than compensation of their civilian positions.

4. That the description of the said six classifications is as follows:

(a) Very little, if any, distinction was made between this group and regular members of the Reserve of similar ranks or ratings with the exception that the former were generally limited in the performance of duty to shore stations within the continental limits of the United States and on vessels operating from continental shore bases.

(b) This constitutes that large group of men who for patriotic reason wished to serve a certain amount of time to relieve regular Coast Guard personnel in the protection of our ports and waterfronts and the patrol of these waterfronts. Their service was purely voluntary and their only compensation was a uniform allowance if they consistently served twelve hours a week. This was known as the Volunteer Port Security Force, of which plaintiff was a member.

(c) Pilots throughout the country were enrolled and put in uniforms in officer rank as far as possible comparable to their position of authority as pilots. This was done for military convenience to make it possible to exercise a certain amount of military control over these men in time of war and to clothe them in some military authority.

(d) Ore-carrying vessels going through the Soo Locks were in the minds of many a likely field for sabotage. The examination and search of vessels was a duty ordinarily devolving upon the Coast Guard but the enormity of the job and lack of personnel made it expedient to commission officers of these vessels, again as military convenience, so that they could make the examinations and enjoy the authority which the uniform would give them, as well as the military control over them which the Coast Guard would then have.

(e) The protection of plants vital to the war effort made it necessary for the Army and Navy, whose responsibility for the protection of these plants it was, to militarize the civilian guards at these plants. The Army used the Auxiliary military police but the Navy turned to the Coast Guard for enrollment of these men as temporary members of the Reserve, the objective being
21 the added authority by a member of the military forces and

military control in emergencies. The legal status of these men was never determined to the point where they actually had the authority hoped for, and the Navy abandoned the program upon the advice of Congress, in February, 1944.

(f) It was decided as a matter of administrative policy to enroll as temporary members of the Reserve a number of Coast Guard civilian key employees, both here at Headquarters and in its field offices. Such employees were, for the most part, performing technical and professional services, and due to their close association with military personnel it was determined that the interests of the Service required the militarization of these employees. They continued to perform the same duties, and retained their Civil Service status and received Civil Service pay.

5. That temporary members of the Coast Guard Reserve were not exempted from the Selective Training and Service Act of 1940, as amended, and many temporary members of the Reserve were in fact drafted or did enlist in the regular or regular Reserve components of the armed forces, thereby necessitating their disenrollment as temporary members of the Coast Guard Reserve.

6. That temporary members of the Coast Guard Reserve serving in the Volunteer Port Security Force were not subject to transfer and, indeed, were not transferred without their consent.

7. That temporary members of the Coast Guard Reserve serving in the Volunteer Port Security Force received no pay for such duty. They did, in most cases, receive a uniform allowance and in some cases, food or subsistence allowance while on active duty.

8. That, generally, efforts were made by the Coast Guard to assign duty periods for the convenience of members of the Volunteer Port Security Force so as to interfere as little as possible with hours of their regular civilian employment. Indeed, many members of the Volunteer Port Security Force were disenrolled at their own request upon representations that their duty assignments conflicted with their civilian employment.

9. That plaintiff herein, Jack W. Cohen, was enrolled as a temporary member of the Coast Guard Reserve at Washington,
22 D. C., on April 13, 1944 as a Seaman, first-class, to serve in the Volunteer Port Security Force and was assigned to the Captain of the Port, Washington, D. C. He was disenrolled on September 5, 1945, having served on active duty on fifty-eight (58) days, for a total service of 398 hours.

And further deponent saith not.

Chester A. Anderson,
CHESTER A. ANDERSON,
Captain, USCG.

Dated: June 21, 1946.

CITY OF WASHINGTON,
District of Columbia, ss:

Chester A. Anderson, being duly sworn, says that he has read the foregoing affidavit, and that all statements made therein are true and correct, save that allegations stated to be made upon information and belief he verily believes to be true and correct.

CHESTER A. ANDERSON.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia this 21st day of June 1946.

[SEAL] EDWARD S. SHANKLE.

My commission expires October 14, 1947.

23 In the District Court of the United States

Civil Action No. 34267

[Title omitted.]

Affidavit in support of defendants motion for summary judgment

CITY OF WASHINGTON,
District of Columbia, ss:

Lawson A. Moyer, being duly sworn, deposes and says:

I am the Executive Director and Chief Examiner of the United States Civil Service Commission, the members of which are named as defendants of the above entitled action. This affidavit is submitted in support of a motion for summary judgment made by the defendants in said action.

On April 4, 1944, by authority vested in it by the Act of June 18, 1929 (46 Stat. 21), and Executive order of April 24, 1931, No. 5610, Executive order of January 18, 1932, No. 5776 and Executive order of June 24, 1938, No. 7915, the United States Civil Service Commission issued Circular Letter No. 4145, a photostat copy of which is attached hereto marked as Exhibit 1, to its regional directors and division chiefs, authorizing the granting of veterans' preference to temporary reservists of the Coast Guard
24 under Public Law No. 8, 77th Congress, the Coast Guard Auxiliary and Reserve Act of 1941. Such preference was to be granted to temporary members of the Coast Guard Reserve, whether full-time, part-time or intermittently, either with or without pay, including Government employees enrolled without pay other than the compensation of their civilian positions.

Thereafter Congress passed Public Law 359, otherwise known as the "Veterans' Preference Act of 1944", approved June 27, 1944, which reads in part:

"SEC. 11. The Civil Service Commission is hereby authorized to promulgate appropriate rules and regulations for the administration and enforcement of the provisions of this Act.

"SEC. 19. It shall be the authority and duty of the Civil Service Commission in all cases under the classified civil service to make and enforce appropriate rules and regulations to carry into full effect the provisions, intent, and purpose of this Act and such Executive orders as may be issued pursuant thereto and in furtherance thereof."

Subsequent to the enactment of the "Veterans' Preference Act of 1944" and pursuant to sections 11 and 19 thereof, the Commission examined its provisions to ascertain if any revision to its then existing rules and regulations pertaining to veterans' preference would be necessary to comply with the Act.

During the course of this study the Commission received a communication from the Acting Secretary of the Navy, a photostatic copy of which is attached hereto marked as Exhibit 2, setting forth that only those persons who served in the Coast Guard Reserve (Temporary) with active full-time duty with pay and allowances at shore stations or on Coast Guard vessels should be classed as veterans upon discharge from the Coast Guard Reserve (Temporary) and that such persons were not entitled to mustering out payments under the "Mustering Out Payments Act" of 1944.

25 A copy of the opinion upon which the Navy made its decision denying "mustering out pay" to members of the Coast Guard Reserve (Temporary) under the "Mustering Out Payments Act of 1944" is attached marked as Exhibit 3.

The Commission, after a careful study of the history of veterans' preference in relation to the provisions of section 2 of the "Veterans' Preference Act of 1944," came to the conclusion that only those members of the Coast Guard Reserve (Temporary) who performed active full-time duty with pay and allowances at shore stations or on Coast Guard vessels were entitled to the benefits of veterans' preference under said Act and, accordingly, promulgated Departmental Circular No. 508 on November 4, 1944, a copy of which is attached hereto marked as Exhibit 4.

The Commission's determination that only those members of the Coast Guard Reserve (Temporary) who performed active full-time duty with pay and allowances at shore stations or on Coast Guard vessels are entitled to veterans' preference under the Veterans' Preference Act of 1944 is consistent with the determination made by the Treasury Department in 1943, briefly stated, "where the pay of a Coast Guard Reserve (Temporary) is received from a civilian employer, or, in the case of a civilian employee of the Government, where the pay is for the civilian position he occupies, the exclusion from gross income provided for in section

22 (b) 13 of the Internal Revenue Code is not applicable," ($1,500 exemption for members of the armed forces for active service in such forces.) A copy of such determination is attached hereto marked as Exhibit 5.

The Commission's denial of veterans' preference to Coast Guard Reservists (Temporary) who serve less than full-time with pay and allowances is consistent with the Administrator's Decision, Veterans' Administration #699, denying such persons bene-
26 fits under the Acts administered by the Veterans' Administration, a copy of which is attached hereto marked as Exhibit 6.

The United States Civil Service Commission's Departmental Circular No. 508 since November 4, 1944 has been and is now in force and effect, and was in force and effect at the time of the denial of veteran's preference to plaintiff under the "Veterans' Preference Act of 1944."

Lawson A. Moyer
LAWSON A. MOYER.

Sworn to and subscribed in my presence this 20 day of August 1946.

R. E. SENEDER,
Notary Public for the District of Columbia.

My commission expires Jan. 1, 1951.

27 *Exhibit 1* C4145–1

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D. C.

APRIL 4, 1944.
XE:P:S

Circular Letter No. 4145 (Manual of Instructions)

Subject: Veteran Preference—United States Coast Guard Reserve.
Regional Directors, and Division Chiefs:

The following information and instructions are forwarded for your attention and guidance, regarding the present active duty status of members of the United States Coast Guard Reserve.

1. Active duty performed by members of the United States Coast Guard Reserve since February 19, 1941, the date of the approval of Public Law 8, 77th Congress, The Coast Guard Auxiliary and Reserve Act of 1941, is considered regular active duty as distinguished from training duty. Certificates of discharge from the United States Coast Guard Reserve showing (1) any active duty since February 19, 1941, and (2) honorable or satisfactory separa-

tion therefrom are acceptable as proof for preference and such certificates need not be referred to the central office.

2. Public Law 8, 77th Congress, The Coast Guard Auxiliary and Reserve Act of 1941, made provision for the enrollment of persons as temporary reservists. During the present war, active duty performed by the temporary members of the Coast Guard Reserve, whether full-time, part-time, or intermittently, either with or without pay, including government employees enrolled without pay other than the compensation of their civilian positions, constitutes active service as distinguished from training duty. Membership in the Coast Guard Auxiliary, a nonmilitary organization, does not constitute membership in the armed forces. Many auxiliarists, however, are also enrolled as temporary members of the Coast Guard Reserve, and, in such cases, if they perform active duty, they are in the armed forces. Preference benefits are applicable to the temporary reservists who furnish proof of (1) active duty whether full-time, part-time, etc. and (2) honorable or satisfactory separation which may be by release, discharge or disenrollment. Such cases need not be forwarded to the central office unless doubtful in any important particular.

3. Questions concerning this Circular Letter should be referred to the Preference Sub-Unit, Services Section, Examination & Personnel Utilization Division.

By direction of the Commission:

L. A. Moyer,
L. A. Moyer,
Executive Director.

28 *Exhibit 2*

THE SECRETARY OF THE NAVY
WASHINGTON

U. S. CIVIL SERVICE COMMISSION,
Washington 25, D. C.

MY DEAR COMMISSIONERS: It has been brought to my attention that a ruling exists to the effect that all members of the U. S. Coast Guard Reserve (Temporary) are members of the Armed Forces on active duty and, as such, are entitled to veterans rights upon discharge.

I have had an investigation of this matter and have arrived at the conclusion that only those members of the Coast Guard Reserve (Temporary) who perform full time active duty with military pay and allowances and who, by reason thereof, are eligible upon separation from the service to mustering out payments under the "Mustering Out Payment Act" of 1944 should be considered as naval veterans upon discharge.

I have been informed that the following are the classifications in which the Coast Guard Reserve (Temporary) have been enrolled.

(a) For active full time duty with pay and allowances at shore stations or on Coast Guard vessels.

(b) For part time or intermittent duty without pay and allowances other than for uniforms. Duty in this classification is usually for a period of twelve hours per week.

(c) Pilots without pay and allowances other than for uniforms.

(d) Officers of Great Lakes vessels without pay and allowances other than for uniforms.

(e) Coast Guard police without pay and allowances.

(f) Civil Service employees of the Coast Guard without pay other than compensation of their civilian positions.

As a result of my investigation as set forth above, it would appear that only those under classification (a) should be classed as naval veterans upon discharge from the Coast Guard Reserve (Temporary).

Sincerely yours,

RALPH A. BARD,
Acting Secretary of the Navy.

29 *Exhibit 3*

DEPARTMENT OF THE NAVY

Office of The Judge Advocate General

WASHINGTON 25, D. C.

In Reply Address The Judge Advocate General of the Navy and Refer to No. JAG:II:WJG:z. L16–4/ET14.

12 APR. 1944.

To: Commandant, U. S. Coast Guard.

Subject: Eligibility of temporary members of Coast Guard Reserve to receive mustering-out pay.

Reference: Ltr., with enc., Comdt., USCG. to SecNavy, 28 Feb. 1944, file CG–784.

Enclosure: Copy of approved opinion of Judge Advocate General of the Navy, dated 11 April 1944, file JAG:II:WJG:z over L16–4/ET14, re Eligibility of temporary members of Coast Guard Reserve to receive mustering-out pay.

1. The enclosure is forwarded for information and is self-explanatory.

By direction of the Judge Advocate General.

(S) L. H. C. JOHNSON,
Commander, U. S. N. (Ret.).

30 DEPARTMENT OF THE NAVY

Office of The Judge Advocate General

WASHINGTON 25, D. C.

In Reply Address The Judge Advocate General of the Navy and Refer to No. J:AG:II:WJG:z. L16-4/ET14.

APR. 11, 1944.

To: The Secretary of the Navy.

Subject: Eligibility of temporary members of Coast Guard Reserve to receive mustering-out pay.

Reference: Ltr., with enc., Comdt., USCG. to SecNavy, 28 Feb. 1944, file CG-784.

1. In the reference decision is requested as to whether temporary members of the Coast Guard Reserve performing full time or part time duty without military pay are eligible on disenrollment for mustering-out payments under the provisions of the Mustering-Out Payment Act of 1944, approved 3 February 1944 (Public Law 225—78th Congress).

2. Section 1 (a) of the Mustering-Out Payment Act of 1944 provides that "each member of the armed forces who shall have been engaged in active service in the present war, and who is discharged or relieved from active service under honorable conditions on or after December 7, 1941, shall be eligible to receive mustering-out payment." The phrase "member of the armed forces" as used in said section 1 (a) is defined in section 6 (a) of the cited Act to include any member of the United States Coast Guard or its components. Section 1 (b) of the Mustering-Out Payment Act of 1944 specifically enumerates certain members of the armed forces who are not entitled to receive mustering-out pay, but no mention is made therein of temporary members of the Coast Guard Reserve, who undoubtedly are members of the armed forces. (Sec. 204, Coast Guard Auxiliary and Reserve Act of 1941, as amended, 14 U. S. C. Supp. II, 304, id., sec. 209, 14 U. S. C. Supp. II, 309; ltr. Acting Sec. Navy to Commissioner of Immigration and Naturalization, Dept. of Justice, 7 Feb. 1944, file JAG: J:JL:amp.) Since temporary members of the Coast Guard Reserve are not in terms excepted from the cited statute as being ineligible to receive the benefits therein prescribed, it would appear that they are entitled to said benefits unless otherwise precluded therefrom.

31 3. It is stated in the reference that, pursuant to section 207 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended (14 U. S. C. Supp. II, 307), approximately 70,000 persons are enrolled as temporary members of the Coast Guard

Reserve for full time or part time and intermittent active duty with or without pay, including "Government employees without pay other than compensation of their civilian positions"; and that, pursuant to such authority, temporary members of the Reserve have been enrolled under formal contracts for the duration of the war, unless sooner terminated by the Coast Guard, in the following classifications:

(a) For active full time duty with pay and allowances at shore stations or on Coast Guard vessels.

(b) For part time or intermittent duty without pay and allowances other than for uniforms. Duty in this classification is usually for a period of 12 hours per week. The enrollee is in a military status only when engaged in such duty or when en route to or from such duty.

(c) Pilots without pay and allowances other than for uniforms. Enrollees in this classification are considered on active duty and subject to call at all times.

(d) Officers of Great Lakes vessels without pay and allowances other than for uniforms. Enrollees in this classification are on active duty only during the open season of navigation on the Great Lakes.

(e) Coast Guard police without pay and allowances. Enrollees in this classification are on active duty and subject to call at all times while they are employed as plant guards.

(f) Civil Service employees of the Coast Guard without pay other than compensation of their civilian positions. Enrollees in this classification are on active duty at all times.

4. It thus appears that temporary Reservists enrolled in the above classifications (b) to (f), inclusive, do not receive
32 military pay or allowances other than uniform allowances, that they retain their civilian positions held at time of enrollment and "work at them for full pay either at the same time that they are performing their military duties, or at times when they are not performing military duties," and finally, that they are employed on active duty for full time or part time and intermittent periods as mentioned above. The status of the personnel covered by subparagraphs (b) to (f), supra, raises the question whether such temporary Reservists properly come within the terms of the Mustering-Out Payment Act of 1944.

5. Section 207 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended, provides:

"The Commandant, with the approval of the Secretary of the Treasury or of the Secretary of the Navy, while the Coast Guard is operating as a part of the Navy, is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe, including but not limited to part-time

and intermittent active duty with or without pay, and without regard to age, members of the Auxiliary, such officers and members of the crew of any motorboat or yacht placed at the disposal of the Coast Guard, and such persons (including Government employees without pay other than compensation of their civilian positions) who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty, as are citizens of the United States or of its Territories or possessions, including the Philippine Islands, to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowances of their respective ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve."

6. Under the terms of Section 207, supra, temporary members of the Coast Guard Reserve may be enrolled for duty either with or without pay. While the term "mustering-out pay" is not used in the Mustering-Out Payment Act of 1944, nevertheless, payments thereunder are considered to constitute pay, which is additional to the pay to which the veteran was entitled at the
33 time of his discharge or relief from active service. The view that amounts payable under the Mustering-Out Payment Act of 1944 represent pay is amply supported by the legislative history of the mustering-out pay legislation, wherein the payments proposed to be made to discharged veterans were repeatedly and specifically referred to as "mustering-out pay." (Cong. Rec., 18 Jan. 1944, p. 351 et seq.; House Committee on Mil. Affairs, Report 986, on S. 1543, Senate Committee on Mil. Affairs, 1 Dec. 1943, pp. 1, 4, 5, 7.).

7. It is also pertinent to point out that the President in his message to the Congress of the United States on 23 November 1943, requesting postwar benefits for members of the armed services, stated, among other things, that "mustering-out pay will be needed" to help service men and women tide over the difficult period of readjustment from military to civilian life.

8. Since, under their contracts of enrollment, temporary members of the Coast Guard Reserve in classifications (b) to (f), inclusive, supra, have expressly agreed to serve on active duty without pay, a determination that such temporary members should be entitled on disenrollment to mustering-out pay under the provisions of the Mustering-Out Payment Act of 1944, in the absence of an affirmative statutory provision to such effect, would be inconsistent with the terms of their enrollment contract. In

other words, it would be unreasonable to conclude, under the present language of said Act and the legislative history connected therewith, that Congress intended to grant any right to pay in amounts as prescribed in the statute to temporary members of the Coast Guard Reserve who expressly contracted to serve on active duty without pay.

9. In consideration of the foregoing, this office is of the opinion that temporary members of the Coast Guard Reserve, other than those performing full time active duty with pay and allowances, are not eligible, on disenrollment, for mustering-out payments under the Mustering-Out Payment Act of 1944.

T. L. Gatch
T. L. GATCH.

Approved:

FRANK KNOX,
Secretary of the Navy.

34 *Exhibit 4* D508–1

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D. C.

NOVEMBER 4, 1944.
XE: HAP: kds

Departmental Circular No. 508

Subject: Status of Members of the U. S. Coast Guard Reserve (Temporary) with Regard to Veteran Preference.

To Heads of Departments and Independent Establishments:

Members of the Coast Guard Reserve (Temporary) have been enrolled according to the following classifications:

(a) For active full-time duty with pay and allowances at shore stations or on Coast Guard vessels.

(b) For part-time or intermittent duty without pay and allowances other than for uniforms.

(c) Pilots without pay and allowances other than for uniforms.

(d) Officers of Great Lakes vessels without pay and allowances other than for uniforms.

(e) Coast Guard police without pay and allowances.

(f) Civil-service employees of the Coast Guard without pay other than compensation of their civilian positions.

The Acting Secretary of the Navy has advised the Commission that only those members of the Coast Guard Reserve (Temporary) falling in classification (a), above, should be considered as naval veterans upon discharge.

In view of the ruling of the Acting Secretary of the Navy, service in the Coast Guard Reserve (Temporary) may be used as a basis for the granting of veteran preference under the Veterans' Preference Act of 1944 only if such service was in classification (a), above, and other conditions necessary to the granting of veteran preference are present.

The provisions of this circular are effective with respect to preference claims which have been granted, to pending claims, and to future claims.

Questions concerning this circular may be addressed to the Civil Service Representative assigned to the agency's Washington or field offices, or to the Examining and Personnel Utilization Division, Preference Sub-Unit, telephone extension 457 (Commission's Central Office), or to the appropriate regional or branch regional office of the Commission.

By direction of the Commission:

Very respectfully,

L. A. Moyer,
L. A. Moyer,
Executive Director and Chief Examiner.

35 *Exhibit 5*

INCOME TAX.—PART I

A. INTERNAL REVENUE CODE

SECTION 22 (b).—GROSS INCOME: EXCLUSIONS FROM GROSS INCOME

SECTION 19.22 (b) (13)-1: Compensation of Military and naval forces.	1943–22–11562 I. T. 3629

INTERNAL REVENUE CODE

Where the pay of a member of the Coast Guard Temporary Reserve is received from a civilian employer or, in the case of a civilian employee of the Government, where the pay of such an individual is for the civilian position he occupies, the exclusion from gross income (additional allowance for military and naval personnel) provided for in section 22 (b) 13 of the Internal Revenue Code, as amended by section 7 (a) of the Current Tax Payment Act, of 1943, is not applicable. Where, however, a member of the Coast Guard Temporary Reserve is called into active service and is paid by the Coast Guard, he is considered to be in the military forces and the exclusion from gross income applies.

Advice is requested whether members of the Coast Guard Temporary Reserve are entitled to the exclusion from gross income (additional allowance for military and naval personnel) provided for in section 22 (b) 13 of the Internal Revenue Code, as amended by section 7 (a) of the Current Tax Payment Act of 1943.

Section 22 (b) 13 of the Internal Revenue Code, supra, provides as follows:

SEC. 22. (b) EXCLUSIONS FROM GROSS INCOME.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(13) ADDITIONAL ALLOWANCE FOR MILITARY AND NAVAL PERSONNEL.—In the case of compensation received during any taxable year and before the termination of the present war as proclaimed by the President, by a member of the military or naval forces of the United States for active service in such forces during such war, * * * so much of such compensation as does not exceed $1,500.

Section 22 (b) 13 of the Code applies only to taxable years beginning after December 31, 1942. (See section 7 (b) of the Current Tax Payment Act of 1943.) Section 29.22 (b) (13)-1 of Regulations 111 provides in part that a person is in active service if he is actually serving in the military or naval forces of the United States, not necessarily in the field or in the theater of war, and it also provides that personnel in the inactive reserve or on retirement are not in active service.

The exclusion from gross income of compensation received for active service in the armed forces of the United States is applicable to compensation received from the United States. In the
36 case of members of the Coast Guard Temporary Reserve, the Bureau has been advised by United States Coast Guard headquarters that ordinarily the personnel of the temporary reserve are paid by their civilian employers. The Coast Guard Temporary Reserve consists of individuals who have been enrolled therein for the purpose of investing them with the authority of coast guardsmen.

Where the pay of such an individual is received from a civilian employer or, in the case of a civilian employee of the Government, where the pay is for the civilian position he occupies, the exclusion from gross income provided for in section 22 (b) 13 of the Internal Revenue Code, supra, is not applicable. Where, however, a member of the Coast Guard Temporary Reserve is called into active service and is paid by the Coast Guard, he is considered to be in the military forces and the exclusion from gross income applies.

37 *Exhibit No. 6*

ADMINISTRATOR'S DECISION, VETERANS' ADMINISTRATION, No. 699

MAY 20, 1946.

Subject: Entitlement of Temporary Members of the Coast Guard Reserve to Benefits Under Laws Governing the Veterans Administration.

Question Presented: Are former temporary members of the Coast Guard Reserve within the purview of the statutes providing for National Service Life Insurance, pension, or medical and hospital services, as beneficiaries of the Veterans Administration?

Facts: The Acting Commandant of the United States Coast Guard states that temporary Reservists of the Coast Guard are divided into six classifications, as follows:

"(a) For active full-time duty with military pay and allowances.

"(b) For part-time or intermittent duty without pay and allowances other than for uniforms.

"(c) Pilots without pay and allowances other than for uniforms but paid by their own companies.

"(d) Officers of Great Lakes vessels without pay and allowances other than for uniforms but paid by their own companies.

"(e) Coast Guard police without pay and allowances.

"(f) Civil Service employees of the Coast Guard enrolled for full-time active duty without pay other than compensation of their civilian positions."

In explanation of the six classifications, the Acting Commandant says:

"(a) Very little, if any, distinction is made between this group and regular members of the Reserve of similar ranks or ratings with the exception that the former were generally limited in the performance of duty to shore stations within the continental limits of the United States and on vessels operating from continental shore bases.

"(b) This constitutes that large group of men who for patriotic reasons wished to serve a certain amount of time to relieve regular Coast Guard personnel in the protection of our ports and waterfronts and the patrol of these waterfronts. Their service was purely voluntary and their only compensation was a uniform allowance if they consistently served twelve hours a week.

"(c) Pilots throughout the country were enrolled and put in uniform in officer rank as far as possible comparable to their
38 position of authority as pilots. This was done for military convenience to make it possible to exercise a certain amount

of military control over these men in time of war and to clothe them in some military authority.

"(d) Ore-carrying vessels going through the Soo Locks were in the minds of many a likely field for sabotage. The examination and search of vessels was a duty ordinarily devolving upon the Coast Guard but the enormity of the job and lack of personnel made it expedient to commission officers of these vessels, again as military convenience, so that they could make the examinations and enjoy the authority which the uniform would give them, as well as the military control over them which the Coast Guard would then have.

"(e) The protection of plants vital to the war effort made it necessary for the Army and Navy, whose responsibility for the protection of these plants it was, to militarize the civilian guards at these plants. The Army used the Auxiliary military police but the Navy turned to the Coast Guard for enrollment of these men as temporary members of the Reserve, the objective being the added authority by a member of the military forces and military control in emergencies. The legal status of these men was never determined to the point where they actually had the authority hoped for, and the Navy abandoned the program upon the advice of Congress, in February of 1944.

"(f) It was decided as a matter of administrative policy to enroll as temporary members of the Reserve a number of Coast Guard civilian key employees, both here at Headquarters and in its field offices. Such employees were, for the most part, performing technical and professional services, and due to their close association with military personnel it was determined that the interests of the Service required the militarization of those employees. They continued to perform the same duties, and retained their Civil Service status and received Civil Service pay."

Comment: The Reserve of the Coast Guard was established by Public No. 8, 77th Congress, entitled,

"An Act to provide for the establishment, administration, and maintenance of a Coast Guard Auxiliary and a Coast Guard Reserve."

Section 207 of that Act, as amended by Public, Nos. 599, 762, and 773, 77th Congress, provides:

"'Sec. 207. The Commandant, with the approval of the Secretary of the Treasury or of the Secretary of the Navy, while the Coast Guard is operating as a part of the Navy, is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe, including but not limited to part-time and intermittent active duty with or without pay, and without regard to age, members of the Auxiliary, such officers

and members of the crew of any motorboat or yacht placed at the disposal of the Coast Guard and such persons (including Government employees without pay other than the compensation of their civilian positions), who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty, as are citizens of the United States or of its Terrorities or possessions, including the Philippine Islands to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowances of their respective ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve.'"

It is at once apparent that as to all such classes except (a) there is no question that they are not in what is ordinarily referred to as the "active military or naval service". For the purpose of benefits in the system stemming from Public No. 2, 73d Congress, including pensions, compensation, medical, hospital and domiciliary care, burial, vocational rehabilitation, loan guaranty or insurance, employment, readjustment allowances, and similar benefits, such service is defined as follows:

"II. The term 'military or naval forces' shall mean the Army, the Navy, the Marine Corps, the Coast Guard, the Naval Reserves, the National Naval Volunteers, and all other branches of the United States service while serving pursuant to law with the Army or Navy.

"III. The term 'person who served' shall mean a person, whether male or female and whether commissioned, enlisted, enrolled or drafted, who was finally accepted for active service in the military or naval forces of the United States, members of training camps authorized by law, and such other persons heretofore recognized by statute as having a pensionable status." (Veterans Regulation No. 10.) (Amendments to paragraph III by section 10, Public No. 144, 78th Congress, and by Public No. 301, 79th Congress, not material to the issue here involved.)

For insurance purposes section 601 (c) of the National Service Life Insurance Act, provides:

"(c) The term 'active service' means active service in the land or naval forces (including the Coast Guard) of the United States and service in the land or naval forces of the United States under the Selective Training and Service Act of 1940, but the service of any person ordered to active duty in any such force for a period of thirty days or less, shall not be deemed to be active service in

such force during such period;" (Amendments to section 601 (c) by section 10, Public No. 144, 78th Congress, and Public No. 301, 79th Congress, not material to the issue here involved.)

As to Class (a) it is clear they are in the active naval (Coast Guard) service unless, as the Congress has the power to do, they have been excepted by statute.

In connection with the question of the status of the temporary members of the Reserve under Selective Service, section 208, Public No. 8, 77th Congress, provides:

"Sec. 208. Members of the Reserve, other than temporary members as provided for in section 207 hereof, shall receive the same exemption from registration and liability for training and service as members of the Naval Reserve, and no member of the Reserve, other than temporary members thereof, shall be a member of any other naval or military organization except the Auxiliary or the Coast Guard as provided for in sections 214 and 215 of this title: Provided, That temporary members of the Reserve who may be members of any other military reserve, if ordered to active duty therein, shall be forthwith released from all active duty with the Coast Guard, and their status as temporary members of the Reserve terminated."

Examination of section 5 (a) of the Selective Training and Service Act of 1940 (Public, No. 783, 76th Congress, as amended), listing those exempted from registration and liability for training and service thereunder, would seem to require the conclusion that as *all* temporary members of the Reserve were not exempt from "registration and liability for training and service", and that those who were members of any other military reserve "if ordered to active duty therein, shall be forthwith released from *all active duty* with the Coast Guard, and their status as temporary members of the Reserve terminated." [Italics supplied.] It was the intent of the Congress that such temporary Reserve was not to have a status identical with that of those organizations of the military establishment whose members were exempted from registration, training and service.

There having been called to attention the fact that as to group (a), it had been held by the Judge Advocate General of the Navy that temporary members of the reserve had veteran status under the Civil Service laws, and that, in other opinions, it had been held that such force constituted a part of the forces "in active service", copies of these opinions were secured to ascertain whether the legal principles therein applied were persuasive to the view that such temporary members of the Coast Guard Reserve were within the purview of the laws governing the Veterans Administration. Examination thereof shows the following:

In an opinion dated April 11, 1944, on the eligibility of temporary members of the Coast Guard Reserve to receive mustering-out pay, under Public, No. 225, 78th Congress, it was stated:

"* * * Since temporary members of the Coast Guard Reserve are not in terms excepted from the cited statute as being ineligible to receive the benefits therein prescribed, it would appear that they are entitled to said benefits unless otherwise precluded therefrom. * * *"

The opinion then goes on to point out that approximately 70,000 persons enrolled as temporary members of the Coast Guard Reserve, for full-time, part-time or intermittent active duty, with or without pay, including Government employees without pay other than compensation for their civilian positions, being enrolled under formal contracts for the duration of the war, unless sooner terminated by the Coast Guard, in the six classifications mentioned in the letter from the Acting Commandant of the United States Coast Guard of October 26, 1945, as quoted above; that classifications (b) to (f), inclusive, do not receive military pay or allowance other than uniform allowances; that such members retain civilian positions held at the time of enrollment and work at them for full pay either while performing their duties or when not performing duty. As to the groups falling within subparagraphs (b) to (f), inclusive, who serve without pay, the opinion concludes that as mustering-out pay constitutes—

41 "* * * *pay*, which is additional to the pay to which the veteran was entitled at the time of his discharge or relief from active service. * * *"

it cannot be paid. This opinion, which is not based on the status, duties, etc., of temporary members, is of no persuasive force in the present question.

An opinion of July 15, 1944, dealt with the status of temporary members under sections 203 and 302 of Public, No. 277, 78th Congress, which provided for the printing and distribution of post cards to be used as applications for ballots, registration, etc. Section 302 defined those to whom the Act applied and included members "of the armed forces" of the United States. The specific question was whether temporary members of the Coast Guard Reserve came within the specific phrase.

The opinion holds that as members of the Coast Guard Reserve, temporary, are subject to the laws and regulations for the government of the Navy, they are members of the armed forces and within the purview of Public, No. 277. This opinion, likewise, is not believed to be authority as regards the question of entitlement under the laws governing the Veterans Administration, which are provided for on the basis of active service, etc.

In an opinion of the Acting Judge Advocate General of the Navy of September 16, 1944, on the question as to "veteran's status" of temporary members of the Reserve, there was cited an opinion of the United States District Court for the Eastern District of Pennsylvania (in re petition of James H. Brown, boatswain's mate, first class, U. S. Coast Guard Reserve (Temporary) for the writ of Habeas Corpus vs. John J. Cain, Warden of the Prison of Delaware County, Pennsylvania), decided in June 1944, in which the court held, in part, as follows:

" 'The relator has been since December 21, 1942, an enrolled temporary member of the Coast Guard Reserve, with the rating of Boatswain's Mate, First Class. *As such he was a member of the armed forces of the United States.*' " [Italics supplied.]

There is cited in the opinion the fact that the Veterans Administration has held that temporary members of the Reserve may not receive the benefits of National Service Life Insurance and that such reservists when killed or injured in line of duty are entitled only to the benefits prescribed by law for civilian employees of the United States. The opinion then concludes:

"7. It would therefore appear that for certain purposes and under certain circumstances members of the Coast Guard Reserve (Temporary) are considered members of the armed forces of the United States, though in a limited status, and are not entitled to all the rights and benefits accruing to members and veterans of the armed services.

"8. In view of the foregoing, I am of the opinion that only those members of the U. S. Coast Guard Reserve (Temporary) who perform full time active duty with military pay and allowances and who by reason thereof are eligible upon separation from the service to mustering-out payments under Public Law 225—78th Congress (Mustering-Out Payment Act of 1944) should be considered as naval veterans."

42 The statement made by the Judge Advocate General of the Navy that the definition of the term "active service" for one purpose would not be controlling (as a matter of fact it may not even be persuasive) on any question which would involve the interpretation of these words under any other law, is concurred in.

The term "active service" under the laws governing the Veterans Administration, has been consistently defined by the Veterans Administration as applying to those in the active military or naval service as such, and not as a quasi-military or civilian adjunct thereto.

In letter dated October 24, 1942, to the Commandant, United States Coast Guard, it was stated, in part:

"Further reference is made to your letter requesting to be advised as to the effect on the payment of veterans' benefits or retired

pay of persons (1) who enroll in the Coast Guard Reserve as temporary officers or enlisted men, pursuant to Section 207 of the Coast Guard Auxiliary and Reserve Act of 1941, as such section was amended by Public Law No. 599, 77th Congress, approved June 6, 1942, where no Coast Guard pay and allowances are involved, (2) who enroll in the Coast Guard Reserve as temporary officers or enlisted men with pay and allowances of their rank or rating, and (3) whether the situation would be different in any case under (2) if the enrollee would agree to waive the receipt of any such veterans' benefits or retired pay for the period of his Coast Guard service.

"In my letter to you of August 3, 1942, referred to in your present inquiry, it was stated, in part, that it was reasonable to conclude that the status of temporary officers and enlisted men in the Coast Guard Reserve is not that of a person in the active service in the military or naval forces (including the Coast Guard) of the United States, and that I was constrained to advise that such persons were not eligible for National Service Life Insurance. For the same reasons which influenced this decision I am of the opinion that such temporary officers and enlisted men in the Coast Guard Reserve are not in the active service of the Navy, including the Coast Guard, within the purview of the statutes and regulations which would prohibit the payment of veterans' benefits or retired pay to persons in receipt of active service pay. * * *"

In XC–3,132,330, 77 Sol. 183, there was considered on November 24, 1944, the question as to the validity of an application for National Service Life Insurance executed by the applicant when enrolled as a temporary member of the United States Coast Guard Reserve, the application having been executed after he was placed on active duty with full pay.

The opinion called attention to advice previously given the Commandant of the United States Coast Guard, that temporary members of the Reserve do not have the status of persons in the active service in the naval forces and held—

"* * * As the application of February 26, 1942, was made while the applicant was a member of the temporary reserve, its rejection was proper, * * *"

43 The status of temporary members of the Reserve of the Coast Guard, under the laws governing the Veterans' Administration, parallels that of the Women's Army Auxiliary Corps under such laws. In discussion the question whether a veteran's widow would be precluded from receiving concurrently death pension (as a widow) and pay as a member of the Women's Army Auxiliary Corps because of the statutory provision that—

"No pension shall be allowed or paid to any officer, noncommissioned officer, or private in the Army, Navy, or Marine Corps

of the United States, either on the active or retired list." (38 U. S. C. 26; Stat. 1082.)

In XC–2,969,369, 63 Sol. 598 [Administrator's Decision No. 502], it was stated:

"* * * Without commitment as to whether any statute, or other law, would preclude payment of pension to a widow in the active military service, the instant case may be disposed of by determination that the enrollment of the veteran's widow as a private in the Women's Army Auxiliary Corps does not constitute active military service. The status of members of the Women's Army Auxiliary Corps is similar in some respects to officers and enlisted men of the Army. Section 13 of Public No. 554, 77th Congress, approved May 14, 1942, creating the Women's Army Auxiliary Corps, provides that the Corps shall be administered by the Secretary of War through the channels of command of the Army pursuant to such regulations as the Secretary may promulgate and that the Secretary is authorized to prepare and issue any and all regulations, rules or orders and to employ any and all of the facilities of the War Department and of the Army of the United States to carry into effect the provisions of that Act.

* * * * *

"Moreover, the provisions of Sections 11 and 12 of the Act show that it was not the intent of Congress to incorporate the Women's Army Auxiliary Corps into the Army of the United States but that it was intended that the Corps should serve as an auxiliary with the Army. Section 11 provides, in part, in case of the injury or death of any member of the Corps incurred in active service in the Corps, for the payment to the member or her beneficiary of all benefits prescribed by law for 'civilian employees' of the United States who are physically injured while in performance of duty or who die as a result thereof. This section also provides that the United States Employees' Compensation Commission shall have jurisdiction in such cases and shall perform the same duties with reference thereto as in the cases of 'other civilian employees of the United States' so injured or otherwise incapacitated. It is further stated in the same section that employees' compensation under that Act shall not be paid concurrently with active duty pay or pension based upon active service. * * *"

It was thereupon concluded that service in the Women's Army Auxiliary Corps was not "active service" within the meaning of the 1891 Act, supra, and therefore that the widow, not being in receipt of active service pay, was not precluded from receiving, concurrently, both pension as a widow and pay as a member of the Women's Army Auxiliary Corps.

44 Another opinion dated November 28, 1944, approved November 29, 1944, held that service in the Women's Army

Auxiliary Corps was not active service within the contemplation of Public, No. 346, 78th Congress.

As to temporary members of the Coast Guard Reserve, section 211, Public, No. 8, 77th Congress, provides:

"Members of the Reserve, other than temporary members thereof, who suffer sickness, disease, disability, or death in line of duty shall be entitled to the same benefits as are or may hereafter be prescribed by law for members of the Naval Reserve who suffer sickness, disease, disability, or death under similar conditions."

Section 212 of the same Act, provides:

"When any temporary member of the Reserve is physically injured in line of duty while performing active Coast Guard service, or dies as a result of such physical injury, he or his beneficiary shall be entitled to all the benefits prescribed by law for civil employees of the United States, and the United States Employees' Compensation Commission shall have jurisdiction in such cases and shall perform the same duties with reference thereto as in the case of civil employees of the United States. Temporary members of the Reserve who contract sickness or disease while performing active duty shall be entitled to the same hospital treatment as is afforded members of the regular Coast Guard."

Section 212 (a), (added by Public, No. 447, 78th Congress), provides:

"'Sec. 212. (a) In case of physical injury or death resulting from physical injury—

"'(1) to any temporary member of the Reserve when incurred after February 19, 1941, in line of duty as a member of the Reserve, while on active duty or engaged in authorized travel to or from such duty; or

"'(2) to any member of the Auxiliary not on active duty as a member of the military or naval forces, when incurred after February 19, 1941, while on Coast Guard patrol pursuant to the request of competent Coast Guard authority, and which would have been incurred in line of duty in the active service had he been a member of the Reserve acting under competent orders; the provisions of the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", approved September 7, 1916 (5 U. S. C., ch. 15), as amended, subject to the other subsections of this section, shall apply, and such Act shall be administered by the United States Employees' Compensation Commission (hereinafter called the Commission) in the same manner and to the same extent as if such person were a civil employee of the United States and were injured while in the performance of his duty: Provided, That for benefit computation, regardless of

pay or pay status, such person shall be deemed to have had monthly pay of $150.'"

45 In Report No. 1093 (Senate 78th Congress, 2nd Session), accompanying H. R. 3704, the Bill enacted as Public No. 447, 78th Congress, it was stated apropos benefits under the Bill that:

"It will be noted from the forgoing schedule of benefits that these, in general, would conform to the benefits provided under laws administered by the Veterans' Administration and, like those laws, would be afforded without regard to the pay status or rank of the individual concerned."

A number of Bills have been introduced in the present Congress for the express purpose of granting a status to temporary members of the Reserve under the laws governing the Veterans' Administration. A report to the Director, Bureau of the Budget, on one of these, S. 1465—

"'A Bill Extending certain recognition and rights to temporary members of the United States Coast Guard Reserve, including the Voluntary Port Security Force, and members of the Coast Guard Auxiliary,'" on November 30, 1945, reads in part:

"The purpose of the bill is to grant disability and death compensation, pensions, allowances, and other benefits to temporary members of the Coast Guard Reserve and members of the Coast Guard Auxiliary who suffer physical injury or death resulting from physical injury incurred after February 19, 1941 in the performance of certain duties for which the benefits provided by the United States Employees' Compensation Act of September 7, 1916, as amended, are now provided, by considering the injury thus sustained as having been incurred by any such member in line of duty as a member of the Regular Coast Guard. The bill further provides for the furnishing of a certificate of honorable service or an honorable discharge under certain conditions and extension of the benefits of the Veterans' Preference Act of 1944 to persons who have performed certain services and received a certificate in evidence thereof.

* * * * *

"Under Section 211, Act of February 19, 1941, members of the Reserve other than temporary members thereof who suffer sickness, disease, disability or death in line of duty are entitled to the same benefits as those now or hereafter prescribed by law for members of the Naval Reserve under Public Law 775, 76th Congress, August 27, 1940, as amended (34 U. S. C. 855 c–1–2) who suffer sickness, disease, disability or death under similar circumstances. Temporary members of the Reserve, on the other hand, are not entitled to such benefits, but are eligible, in case of physical injury or death resulting from physical injury incurred after February 19, 1941 in line of duty as a member of the Reserve while

on active duty or engaged in authorized travel to or from such duty to the benefits provided civilian employees of the United States under the United States Employees' Compensation Act, as amended; and for benefit computation, regardless of pay or pay status are deemed to have had monthly pay of $150.

"It has long been the policy of the Congress to restrict veterans' benefits, as such, to persons who served in active military or naval service, and it is the view of the Veterans' Administration that the basic requirement of active military or naval service as a
46 prerequisite to entitlement to such benefits under laws administered by the Veterans' Administration is fundamentally sound. Service such as that rendered by temporary members of the Coast Guard Reserve and members of the Coast Guard Auxiliary is recognized as essentially civilian service and provision is made for such members through extension to them of the benefits provided for civilian employees of the United States and certain civilian groups subjected to war hazards, under the United States Employment Compensation Act, as amended."

As alreday shown above, it has been the consistent view of the Veterans' Administration that where the organic Act restricts the potential right of a beneficiary thereunder to benefits "prescribed by law for civil employees of the United States" as does section 212, Public No. 8, 77th Congress, as amended, any person whose rights are governed by such Act is not entitled to pension benefits under the laws governing the Veterans' Administration in the absence of specific legislation extending benefits to them. This was one of the premises resulting in the conclusion that the Women's Army Auxiliary Corps was not within the purview of any of such laws until Public No. 10, 78th Congress, specifically extended hospitalization, domiciliary care and burial benefits to such Corps.

It is also to be noted that in 77 Sol. 183, the words "active service" as used in section 601 (c) of the National Service Life Insurance Act were defined as not including a temporary member of the Coast Guard Reserve, even though on active, full-time duty with pay. (Group (a).)

HELD: Temporary members of the Coast Guard Reserve are not within the purview of the laws governing the Veterans' Administration for pensions, National Service Life Insurance or medical and hospital services as beneficiaries of the Veterans' Administration. (Opinion of the Solicitor, Veterans' Administration, dated March 15, 1946.)

This decision is hereby promulgated for observance by all officers and employees of the Veterans' Administration.

Omar N. Bradley,
OMAR N. BRADLEY,
General, U. S. Army,
Administrator of Veterans' Affairs.

47 In the District Court of the United States

Civil Action No. 34267

[Title omitted.]

Affidavit of F. A. Crisp

F. A. Crisp being duly sworn deposes and says:

I, F. A. Crisp, in the Office of the Secretary of the Navy, have knowledge of the facts hereinafter set out, and I am authorized to make the following averments:

I make this affidavit to supplement the affidavit of Lawson A. Moyer the Executive Director and Chief Examiner of the United States Civil Service Commission, submitted in support of defendants' motion for summary judgment and in opposition to plaintiff's motion.

Mr. Moyer's affidavit does not completely set out the chain of events leading up to the letter from the Acting Secretary of the Navy to the United States Civil Service Commission dated October 9, 1944, which is set out as Exhibit 2 of defendants' moving papers. The matter in issue was brought to the attention of the Acting Secretary of the Navy by the Director of Shore Establishments and Civilian Personnel, Navy Department, by a memorandum dated 22 August 1944, which was referred by the Acting Secretary of the Navy to the Judge Advocate General, Navy Department, who returned it under date of September 16, 1944, with an opinion endorsed thereon.

48 Attached hereto is a photostatic copy of a certified copy of said memorandum and endorsement of opinion, which are true copies of official documents on file in the Navy Department.

The original of those documents were received by the Acting Secretary of the Navy and were the basis of his letter to the United States Civil Service Commission dated October 9, 1944, which is shown as Exhibit 2 of the moving papers.

The position taken by the Acting Secretary of the Navy was promulgated throughout the Navy Department, put into effect, and at the time of the disenrollment of the plaintiff in this action was shown as standing instructions known as Instruction No. 120 of the Navy Civilian Personnel Instructions (NOPI–120.1–1, 15 June 1945), a true copy of which is also attached to this affidavit.

F. A. Crisp.

Sworn to before me this 15 day of October 1946.

K. M. McManes,
Captain, U. S. Navy.

Copy received: John L. Burling. Oct. 16, 1946.

50 *Exhibit "B"*

SECP-290: wh.

22 AUGUST 1944.

Memorandum

To: Acting Secretary of the Navy.
Subj: Coast Guard Reserve Tempo. .ry—Veteran Status of.

1. The Civil Service Commission has informed this office that the Commandant, U. S. Coast Guard, has ruled that members of the Coast Guard Reserve Temporary are members of the Armed Forces. As a result, the Civil Service Commission has been forced to extend veterans' preference to honorably discharged members of that group.

2. The Chief of the Veterans Section, National Headquarters, Selective Service System; the Civil Service Commission and various veteran organizations are strongly opposed to giving this group veteran status.

3. Representatives of various veterans' organizations attended a conference at the Civil Service Commission on 16 August 1944 for the purpose of determining what action should be taken in this matter. This matter is to be part of the agenda at the various conventions of Veterans Organizations to be held in the near future.

4. The Coast Guard Reserve Temporary includes such classes of persons as the following:

(a) Pilots.

(b) Owners, regular officers, and members of the crew of motorboats or yachts placed at the disposal of the Coast Guard.

(c) Plant guards.

Members of this group are on duty for intermittent periods. They may serve with or without pay. They serve for a definite period of days, for a week or for a month. The period of active duty is controlled by their agreement with the Coast Guard. They cannot be called to duty for a period which exceeds the period set forth in their agreement.

5. Reports reaching this office indicate that as soon as the ruling of the Civil Service Commission was promulgated, many government employees have enrolled with this group.

6. The arguments in favor of declaring this group to be part of the Armed Forces are as follows:

(a) The Coast Guard Auxiliary and Reserve Act of 1941 which creates the Reserve and the Temporary Reserve establishes
51 the Reserve as part of the Armed Forces. It might be argued that the Temporary Reserve is part of the Reserve and therefore, also, part of the Armed Forces.

(b) Members of the Temporary Reserve while on active duty are subject to military discipline and punishment.

(c) At the outbreak of the present war, members of the Temporary Reserve patrolled off our coasts and were subject to combat.

(d) The U. S. Government would probably contend if any of this group were captured while on active duty that they were entitled to the status of prisoners of war and not that of civilians.

7. However, it is the opinion of this office that members of the Coast Guard Reserve Temporary are not part of the Armed Forces and therefore are not entitled as a group to veteran status. This opinion is based upon the following reasons:

(a) The Coast Guard Auxiliary and Reserve Act of 1941 indicates that Congress intended the Temporary Reserve to be considered as something different than the regular reserve.

(b) Members of this group may retain their civilian employment and pay while in the Temporary Reserve.

(c) Members of this group must register for Selective Service purposes and are subject to induction into the Armed Forces.

(d) Many members of this group receive no military pay while on duty but are paid by their civilian employers.

(e) Members of this group do not receive the benefits of National Life Insurance.

(f) Members of this group may be members of other Naval or Military organizations.

(g) Members of the Temporary Reserve cannot be compelled to serve for a period in excess of the period set forth in their enlistment.

(h) Members of this group when killed or injured in the line of duty are entitled only to the benefits prescribed by law for civilian employees of the United States.

8. If veteran status is given to the Coast Guard Reserve Temporary, the following problems among others will arise:

(a) Many civilians, especially Federal Employees, will attempt to enlist with this group in order to secure veteran
52 status. They will be able to stay home with their families, draw their civilian war time pay and still get veterans status.

(b) The Coast Guard Temporary Reservist who has been discharged will be in a better position than the one not discharged since veterans preference requires that the one claiming it, must have an honorable discharge from the Armed Forces.

9. This matter is brought to the attention of the Secretary because it is believed that the best interests of the Navy are not being served by the present classification of these reservists as veterans.

F. G. CRISP.

53 *Exhibit "C"*

JAG:II:JAL:amp.

Second Endorsement on Memo. SECP-290; wh of 22 August 1944, to Acting SecNav.

16 SEP. 1944.

To: Secretary of the Navy.
Subject: Coast Guard Reserve Temporary—Veteran status of.

1. Returned.

2. By statute, the Coast Guard Reserve consists of two classes, regular and temporary (14 U. S. C. Supp. III, 301) and is declared to be a military organization (14 U. S. C. Supp. III, 304). It is a "component part of the Coast Guard" (14 U. S. C. Supp. 302), though most of its members (temporary) have been held to be not entitled to mustering-out payments under the Act of February 3, 1944 (JAG:II:WJG:z; L16-4/ET14; 11 Apr. 1944). The Secretary of the Navy on 15 July 1944 held that "members of the Coast Guard Reserve (temporary) are members of the armed forces of the United States" within the meaning of Public Law 277, 78th Congress (Servicemen's Voting Law) and under date of 7 February 1944, the Acting Secretary of the Navy, in a letter addressed to the Commissioner of Immigration and Naturalization, after considering many of the arguments advanced in paragraph 7 of basic memorandum, ruled that temporary members of the Coast Guard Reserve "are considered to be members of a 'naval or military organization'" so as to render them eligible for expeditious naturalization under the provisions of the Nationality Act of 1940.

3. In an opinion of the U. S. District Court for the Eastern District of Pennsylvania (In re Petition of James H. Brown, boatswain's mate, first class, U. S. Coast Guard Reserve (Temporary) for the writ of Habeas Corpus vs. John J. Cain, Warden of the Prison of Delaware County, Pennsylvania), decided in June 1944, the court held in part, as follows:

"The relator has been since December 21, 1942 an enrolled temporary member of the Coast Guard Reserve, with the rating of Boatswain's Mate, First Class. *As such he was a member of the armed forces of the United States.*" [Italics supplied.]

4. It is understood that approximately 70,000 persons are enrolled as temporary members of the Coast Guard Reserve pursuant to Section 207 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended (14 U. S. C. Supp. II, 307) and serve full time, or part time intermittent active duty, with or without
54 pay. Pursuant to the above Act, temporary members of the Reserve have been enrolled under formal contracts for the

duration of the war, unless terminated sooner by the Coast Guard, in several different classifications do not receive military pay or allowances, other than uniform allowances, and continue to hold the same civilian positions held at the time of their enrollment and "work at them for full pay either at the same time that they are performing their military duties, or at times when, they are not performing military duties." (Ltr. Cdt. USCG to SecNav 28 Feb. 1944, file CG–784.) Members of such classifications serve only a minimum of 12 hours per week and are not subject to transfer without their consent.

5. The liability of members of the Coast Guard Reserve (Temporary) to the Selective Training and Service Act of 1940, as amended, is stated by that law to be that—

"Members of the Reserve, *other than temporary members* [italics supplied] * * * shall receive the same exemption from registration and liability for training and service as members of the Naval Reserve, * * *". (14 U. S. C. Supp. 308.)

Members of the Coast Guard Reserve (Temporary) are subject to the laws, regulations and orders for the Coast Guard "when employed *on active duty* [italics supplied] * * * or while wearing a uniform prescribed for the Reserve." (14 U. S. C. Supp. 309.)

6. So far as benefits are concerned, the matter of insurance is under the jurisdiction of the Veterans' Administration which activity it is understood thas ruled that Temporary Coast Guard reservists may not receive the benefits of National Life Insurance. Such reservists, when killed or injured in line of duty, are entitled only to the benefits prescribed by law for civilian employees of the United States.

7. It should therefore appear that for certain purposes and under certain circumstances members of the Coast Guard Reserve (Temporary) are considered members of the armed forces of the United States, though in a limited status, and are not entitled to all the rights and benefits accruing to members and veterans of the armed services.

8. In view of the foregoing, I am of the opinion that only those members of the U. S. Coast Guard Reserve (Temporary) who perform full time active duty with military pay and allowances and who by reason thereof are eligible upon separation from the service to mustering-out payments under Public Law 225—78th Congress (Mustering-Out Payment Act of 1944) should be considered as naval veterans.

55 9. It is recommended that consideration be given by the Secretary of the Navy to the issuance of a directive prohibit-

ing further enrollments in the Coast Guard Reserve (Temporary) except for full time active duty with military pay and allowances.

F. L. LOWE,
Acting Judge Advocate General.

93 In The District Court of The United States
For The District of Columbia

Civil Action File No. 34267

JACK W. COHEN, PLAINTIFF
v.
HARRY B. MITCHELL, LUCILLE FOSTER MCMILLIN, ARTHUR S. FLEMMING, DEFENDANTS

Order

Filed Oct. 25, 1946

This cause came on to be heard on cross motions of plaintiff and of defendants for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the court having considered the pleadings and the affidavit of plaintiff Jack W. Cohen in support of his motion and the affidavits of F. A. Crisp, Chester A. Anderson, and Lawson A. Meyer in support of defendants' motion; and having heard oral argument; and having found that there is no genuine issue as to any material fact; and having concluded that plaintiff Jack W. Cohen is entitled to judgment as a matter of law, it is by the court this 25th day of October, 1946:

Adjudged and declared: That plaintiff, as a man who served on active duty, although temporary, intermittent, and without pay, in the United States Coast Guard Reserve during a portion of World War II and who has been honorably separated from the Coast Guard Reserve which was a portion or branch of the armed services of the United States, is entitled to the preference in employment created by the Veterans' Preference Act of 1944.

94 And it is further adjudged, ordered, and decreed: That defendants Harry B. Mitchell, Lucille Foster McMillin, and Arthur S. Flemming shall forthwith classify plaintiff Jack W. Cohen as a preference eligible pursuant to the Veterans' Preference Act of 1944 (5 United States Code, Section 851 et seq.) and that said defendants having granted said preference to said plaintiff shall thereafter refrain from denying preference eligibility to

plaintiff or from in any manner taking any action which will deny to plaintiff such status.

T. ALAN GOLDSBOROUGH,
Justice.

Not objected to as to form.

JOHN F. SONNETT,
Assistant Attorney General.

96 In the District Court of the United States for the District of Columbia, Motions Court

Civil Action No. 34267

Civil Action No. 34268

[Title omitted.]

WASHINGTON, D. C., *October 17, 1946.*

The above-entitled causes came on for hearing on a motion for summary judgment before Hon. T. Alan Goldsborough, Associate Justice, at 2 o'clock p. m.

97 Appearances: On behalf of the plaintiffs: John Burling, Esq. On behalf of the defendants: Frank Hayden, Esq., Ralph B. Gregg, Esq., of the Indiana Bar, representing the American Legion. Arthur M. Gladstone, Esq., of the New York Bar, representing the Coast Guard League.

Conclusion of the court

(After oral argument)

The COURT. Gentlemen, I don't have any difficulty about this case at all. The statute is as follows and includes among those entitled to Federal Employment preference "those ex-service men and women who have served on active duty in any branch of the armed forces of the United States during any war or any campaign or expedition for which a campaign badge has been authorized, and have been separated therefrom under honorable conditions."

Now, of course, it is not contended that under the letter of what I have just read there can be any doubt that these petitioners are included, but the contention is made that the Court has the right by construction, to say that Congress could not have had in mind individuals of the class of these plaintiffs, because of the fact that in practice, while they could have been—after they
98 had once signed up—they could have been called into active and continuous service as a matter of practice they only served during certain hours of the night, retaining their civilian positions.

Now, what right have I to place such a construction upon the Act?

These men when they were called out were admittedly sailors, and during the time they were out—I used that expression "at night" in this service they were subject in every respect to the duties and obligations of being sailors—they were not "guerillas," they would have been entitled to the protection under international law that a sailor is entitled to.

Now, of course, when an Act of Congress is subject to construction or interpretation and the Court can give an interpretation which the Court feels is carrying out the real purpose of Congress, the Court has the right to interpret and construe it. There is no doubt whatever in the Court's mind that there is no room for construction in Section 4 of this Act providing for persons entitled to Federal Employment preference and that the claimants here come within the terms of that section, and the relief of summary judgment now requested by the plaintiffs will be granted.

99 REPORTER'S CERTIFICATE

I, O. H. Frost, one of the official reporters for the District Court of the United States for the District of Columbia, hereby certify that the foregoing is the official transcript of the Court's conclusions in the above-entitled causes.

O. H. Frost, *Official Reporter.*

100 In the District Court of the United States

Civil Action No. 34267

[Title omitted.]
[File endorsement omitted.]

Notice of Appeal

Filed Nov. 19, 1946

Notice is hereby given that Harry D. Mitchell, Lucille Foster MmMillin, and Arthur S. Flemming, the defendants above named, hereby appeal to the Court of Appeals for the District of Columbia from the order of injunction entered in this action on October 17, 1946.

Dated November 19, 1946

John F. Sonnett,
John F. Sonnett,
Assistant Attorney General.
George Morris Fay,
George Morris Fay,
United States Attorney,
Attorneys for the Defendants.

767175—47——4

Copies sent to: Gerhard Gesell, Union Trust Building. William Merrick Parker, Union Trust Building.

NOVEMBER — 1946.

103 In the District Court of the United States for the District of Columbia.

Civil Action File No. 34268

HARRY W. HUBICKEY, 323 S. 3rd STREET, COLWYN, PA., PLAINTIFF

v.

HARRY B. MITCHELL, 7TH AND F STREETS, NW., WASHINGTON, D. C.; LUCILLE FOSTER MCMILLIN, 7TH AND F STREETS, NW., WASHINGTON, D. C., ARTHUR S. FLEMMING, 7TH AND F STREETS, NW., WASHINGTON, D. C., DEFENDANTS

Complaint for injunction and declaratory relief

Filed April 12, 1946

To the Honorable Justices of the District Court of the United States for the District of Columbia:

1. Jurisdiction founded on the existence of a federal question. This action involves the Veterans' Preference Act of 1944, 58 Stat. 387; U. S. C. Title 5, § 851, as hereinafter more fully appears.

2. Plaintiff is a citizen of the United States, residing at 323 S. 3rd Street, Colwyn, Pennsylvania.

104 3. Defendants are the members of the United States Civil Service Commission, and are sued both in their official and individual capacity. All of the defendants maintain their official residence within the District of Columbia. Defendants are charged with responsibility for the administration and enforcement of the provisions of the Veterans' Preference Act of 1944.

4. Defendants have refused to grant plaintiff the status of a preference eligible to which he is lawfully entitled as an ex-serviceman under the provisions of Sections 2 and 18 of the Veterans' Preference Act of 1944.

5. Plaintiff served on active duty as a member of the United States Coast Guard Reserve (Temporary), a branch of the armed forces of the United States during World War II, and was separated therefrom on September 30, 1945, under honorable conditions. The United States Coast Guard Reserve (Temporary) was created and functioned in accordance with the Coast Guard Auxiliary and Reserve Act of 1941, 55 Stat. 11, U. S. C., Title 14, § 301. Plaintiff enrolled as a member of the Coast Guard Reserve

(Temporary) on October 18, 1944, with the rank of Seaman First Class, at which time he executed a form entitled "Temporary Member of the Coast Guard Reserve—Enrollment and Active Duty Assignment," a true copy of said form being attached hereto and marked "Plaintiff's Exhibit One." Plaintiff continued to serve as a member of such Reserve on a part-time active duty assignment, without compensation, until September 30, 1945, at which time he was honorably disenrolled with the rank of Seaman First Class and presented with a "Certificate of Disenrollment," a true copy of said certificate being attached hereto and marked "Plain-
105 tiff's Exhibit Two."

Plaintiff was issued necessary uniform and equipment and received food and quarters while on active duty. At all times while on active duty, either traveling to or from such duty, or when wearing the uniform prescribed, plaintiff was subject to the laws, regulations, and orders for the government of the Coast Guard and was subject to disciplinary action for any offense committed thereunder.

6. Subsequent to his honorable disenrollment from active duty in the United States Coast Guard Reserve (Temporary), plaintiff applied to the United States Civil Service Commission for recognition as a preference eligible under the provisions of the Veterans' Preference Act of 1944, in accordance with the regulations and procedures of the Civil Service Commission on its prescribed Form 14, entitled "Veteran Preference Claim." Plaintiff was notified by the Civil Service Commission that his claim had been rejected for the reason that his service was for part-time or intermittent duty without pay or allowances other than for uniforms. A true copy of this rejection, Civil Service Form 3593, is attached hereto and marked "Plaintiff's Exhibit Three."

7. Plaintiff has been employed as a Naval Architect, Navy Department, for a period of six years. On March 28, 1946, plaintiff was notified that he would be separated from this service on April 26, 1946, because of a reduction in force. A true copy of this Notice of Reduction in Force is attached hereto and marked "Plaintiff's Exhibit Four."

The refusal of defendants to grant plaintiff the status of a preference eligible adversely and directly affects plaintiff's op-
106 portunity to continue in government employment. Unless plaintiff is granted the status of a preference eligible, he will suffer irreparable damage through the loss of his position with the United States Government. Plaintiff has pursued whatever administrative remedies are available to him in seeking to obtain a determination of his eligibility for status as a preference eligible, and is without other remedy than this action in seeking to have his rights in this regard determined.

8. On April 4, 1944, prior to the enactment of the Veterans' Preference Act of 1944, the United States Civil Service Commission issued Circular Letter No. 4145 to Regional Directors and Division Chiefs of the Commission, providing as follows:

C4145–1

"UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D. C.

April 4, 1944.
XE:P:S

"Circular Letter No. 4145 (Manual of Instructions)

Subject: Veteran Preference—United States Coast Guard Reserve.

Regional Directors, and Division Chiefs:

"The following information and instructions are forwarded for your attention and guidance, regarding the present active duty status of members of the United States Coast Guard Reserve.

"1. Active duty performed by members of the United States Coast Guard Reserve since February 19, 1941, the date of the approval of Public Law 8, 77th Congress, The Coast Guard Auxiliary and Reserve Act of 1941, is considered regular active duty as distinguished from training duty. Certificates of discharge from the United States Coast Guard Reserve showing (1) any active duty since Febuary 19, 1941, and (2) honorable or satisfactory separation therefrom are acceptable as proof for preference and such certificates need not be referred to the central office.

"2. Public Law 8, 77th Congress, The Coast Guard Auxiliary and Reserve Act of 1941, made provisions for the en-
107 rollment of persons as temporary reservists. During the present war, active duty performed by the temporary members of the Coast Guard Reserve, whether full-time, part-time, or intermittently, either with or without pay, including government employees enrolled without pay other than the compensation of their civilian positions, constitutes active service as distinguished from training duty. Membership in the Coast Guard Auxiliary, a nonmilitary organization, does not constitute membership in the armed forces. Many auxiliarists, however, are also enrolled as temporary members of the Coast Guard Reserve, and, in such cases, if they perform active duty, they are in the armed forces. Preference benefits are applicable to the temporary reservists who furnish proof of (1) active duty whether full-time, part-time, etc., and (2) honorable or satisfactory separation which may be by release, discharge, or disenrollment. Such cases need not be forwarded to the central office, unless doubtful in any important particular.

"3. Questions concerning this Circular Letter should be referred to the Preference Sub-Unit, Services Section, Examination & Personnel Utilization Division.

"By direction of the Commission:

L. A. MOYER,
Executive Director."

9. Sometime in August 1944, following enactment of the Veterans' Preference Act of 1944, the United States Civil Service Commission issued a pamphlet entitled "From Military Service to Civil Service, Answers to Questions of Returning Servicemen and Servicewomen about Federal Employment," which stated that members of the Coast Guard Reserve (Temporary) who had been discharged under honorable conditions were considered members of the armed forces and as such entitled to the status of preference eligible.

10. On November 4, 1944, the United States Civil Service Commission issued the following circular:

"D508–1

"UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D. C.

NOVEMBER 4, 1944.
XE: HAP: kds

"Departmental Circular No. 508

108 "Subject: Status of Members of the U. S. Coast Guard Reserve (Temporary) with Regard to Veteran Preference.

"*To Heads of Departments and Independent Establishments:*

"Members of the Coast Guard Reserve (Temporary) have been enrolled according to the following classifications:

(a) For active full-time duty with pay and allowances at shore stations or on Coast Guard vessels.

(b) For part-time or intermittent duty without pay and allowances other than for uniforms.

(c) Pilots without pay and allowances other than for uniforms.

(d) Officers of Great Lakes vessels without pay and allowances other than for uniforms.

(e) Coast Guard police without pay and allowances.

(f) Civil-service employees of the Coast Guard without pay other than compensation of their civilian positions.

"The Acting Secretary of the Navy has advised the Commission that only those members of the Coast Guard Reserve (Temporary) falling in classification (a) above, should be considered as naval veterans upon discharge.

"In view of the ruling of the Acting Secretary of the Navy, service in the Coast Guard Reserve (Temporary) may be used as a basis for the granting of veteran preference under the Veterans' Preference Act of 1944 only if such service was in classification (a), above, and other conditions necessary to the granting of veteran preference are present.

"The provisions of this circular are effective with respect to preference claims which have been granted, to pending claims, and to future claims.

"Questions concerning this circular may be addressed to the Civil Service Representative assigned to the Agency's Washington field offices, or to the Examining and Personnel Utilization Division, Preference Sub-Unit, telephone extension 457 (Commission's Central Office), or to the appropriate regional or branch regional office of the Commission.

"By direction of the Commission:

Very respectfully,

L. A. MOYER,
Executive Director and Chief Examiner.

109 11. Defendants are without legal authority or discretion to make or enforce any rule or regulation which denies to plaintiff the status of a preference eligible under the Veterans' Preference Act of 1944. Defendants have acted contrary to the express terms and requirements of that Act in denying plaintiff such status. The action of the defendants in this regard is wholly arbitrary and discriminatory, depriving plaintiff of the rights and privileges conferred upon him by such Act to his immediate and continuing detriment.

Wherefore plaintiff demands judgment as follows:

1. That this court order defendants to classify plaintiff as a preference eligible under the Veterans' Preference Act of 1944, and thereafter to refrain from taking any action which will deny plaintiff such status.

2. That this court adjudge and declare that plaintiff, as a member of the United States Coast Guard Reserve (Temporary) who served during World War II and was separated therefrom under honorable conditions, is entitled to the status of a preference eligible under the provisions of the Veterans' Preference Act of 1944.

3. That plaintiff recover his costs.

4. That plaintiff have such other and further relief as is just.

GERHARD A. GESELL,
Attorney for Plaintiff.
COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB,
701 Union Trust Building, Washington, D. C.

110 *Exhibit One*

TEMPORARY MEMBER OF COAST GUARD RESERVE

ENROLLMENT AND ACTIVE DUTY ASSIGNMENT

From Office of District Coast Guard Officer:

Naval District _____ City _____ State _____ Date _____.

To _____ Rank or Rating _____

1. In accordance with the provisions of the Coast Guard Auxiliary and Reserve Act of 1941, as amended, and Coast Guard Reserve Regulations as amended, and subject to your acceptance and execution of the prescribed oath of office or oath of allegiance, you are hereby enrolled as a temporary member of the United States Coast Guard Reserve, with the rank or rating indicated above, USCGR, class T, from date of oath.

2. The period of your enrollment shall be for the duration of the war upon the completion of which you will be disenrolled unless the period of your enrollment is sooner terminated by Coast Guard authority.

3. You will perform such duties as may be prescribed from time to time by Coast Guard authority in the classification checked below:

1. ☐ Auxiliary members enrolled in class T.
2. ☐ Volunteer Port Security Force.
3. ☐ Enrolled for other volunteer duty, namely_____
4. ☐ Pilots.
5. ☐ Coast Guard Civil Service Employees.
6. ☐ Officers of Great Lakes Vessels.

You are authorized to wear the prescribed uniform only while on active duty and while en route to and from such duty. Members in classifications 1, 2, and 3 will be on active duty only as directed by competent authority for a minimum of 12 hours per week. They will not be subject to transfer without their consent. Members in classifications 4 and 5 will be on active duty and subject to call at all times. Members in classification 6 will be on active duty only during the open season of navigation on the Great Lakes.

4. Your military status as a member of the U. S. Coast Guard Reserve shall attach during periods when you are actually engaged on active duty or en route to and from such duty. In the performance of your duty as a temporary member of the United States Coast Guard Reserve, you are vested with the same power and authority as members of the regular Coast Guard of similar rank, grade, or rating. You shall be subject to the laws, regulations, and orders for the government of the Coast Guard and to disciplinary action for offenses committed while subject thereto, in accordance

with the provisions of Section 209 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended.

5. You will serve without pay and allowances (other than compensation of their civilian positions in the case of Government employees), except (1) such travel and subsistence allowances as may be specifically authorized and (2) uniform allowances of:

---

6. You are not by reason of enrollment as a temporary member of the Reserve exempt from registration and liability for training and service under the Selective Training and Service Act.

7. You will be entitled to the following benefits and privileges only: (a) In the case of physical injury in line of duty while performing active Coast Guard service, or death as a result of such physical injury, the benefits prescribed by law for civil employees of the United States, as administered by the United States Employees' Compensation Commission, to the extent that the same may be applicable. (b) In the case of sickness or disease contracted while performing active duty, the same hospital (including medical, but excluding dental) treatment as is afforded members of the regular Coast Guard. (c) Such other benefits and privileges as may be specifically authorized from time to time for temporary members of the Reserve or classifications thereof by law or regulations.

8. You are hereby ordered, upon acceptance of this enrollment and execution of the prescribed oath, to commence active duty at:

In accordance with the above terms and conditions, effective

Accepted _____ Date _____ Enrolling Official (By Direction of the Commandant) _____.

Oath of Office (For Officers):

Having been enrolled as _____ (temporary) in the United States Coast Guard Reserve, I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. SO HELP ME GOD. And I do further swear (or affirm) that I will use my best endeavors to prevent and detect frauds against the laws of the United States imposing duties upon imports. SO HELP ME GOD.

Subscribed and Sworn to before me this _____ day of _____, 19____.

_____ _____

(Signature and title) UNITED STATES COAST GUARD RESERVE (Temporary)

Oath of Allegiance (For Enlisted Men):

Having been enrolled as _____ (temporary) in the United States Coast Guard Reserve, I, _____ do solemnly swear (or affirm) that I will bear true faith and allegiance to the United of America, and that I will serve them honestly against all their enemies whosoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the laws and regulations for the government of the United States Coast Guard. Subscribed and sworn to before me this _____ day of _____ 19___.

_____ _____

(Signature and title)

UNITED STATES COAST GUARD RESERVE (Temporary)

112 *Exhibit Two—Back Page*

Enrolled as: Sea. 1/c. 6195-936. On 18 October 1944 at Philadelphia, Pa. Ratings held: Sea. 1/c. Training Course completed: Volunteer Training School. Served on active duty for a total of 32 days. Rating at release Sea. 1/c.

113 *Exhibit Three*

Members of the Coast Guard Reserve (Temporary) are considered as having performed active duty in the armed forces only when such duty is full-time active duty with pay and allowances. As your service was for part time or intermittent duty without pay and allowances, other than for uniforms, your claim for preference is disallowed. 34268.

5 April 1946.

Form 3953—October 1942.

Mr. HARRY N. HUBICKEY,
323 S. 3rd St., Colwyn, Pa.

The Commission regrets to inform you that your request for military preference benefits cannot be given favorable consideration for the reason checked below:

——Dishonorable discharge
——Separation not honorable
——No active Federal military or naval service
——Service in civilian capacity
——Service for training only
——Preference not applicable to children of veterans
——Divorced from veteran prior to his death
——Remarried after death of veteran
——Husband not disqualified by service-connected disability
——Husband not over 55 and disability not service-connected
——See note on other side

Please be assured that your application is receiving our most careful attention, although we are asking all applicants, in the interest of the War Program, to refrain from making inquiries concerning the status of pending applications, prospects of appointment and similar matters which tend to prevent concentration of our resources on recruiting and placement activities essential to the War Program.

LABOR BOARD,
Philadelphia Naval Shipyard, Phila., Pa.

Exhibit Two—Front Page



767175—47 (Face p. 54)

114 *Exhibit four*

P16-1 (5) 170

UNITED STATES NAVAL SHIPYARD
PHILADELPHIA 12, PA.

28 MARCH 1946.

To: Harry W. Hubickey, Check #031275, Naval Architect, P-3.
Via: Design Superintendent.
Subj: Notice of Reduction in Force.

1. The Commander regrets that it will be necessary to separate you from the service because of a reduction in force, made necessary by decrease of work. Your last day on the rolls will be 26 April 1946. If, at that time, you have additional annual leave to your credit, payment will be made for the entire unused portion in one lump sum with your next payment following that date.

2. Your services have been satisfactory and your selection for separation has been made in accordance with the Civil Service Commission's regulations governing reductions in force, which take into account the nature of your appointment, whether or not you are entitled to veteran preference, your efficiency rating, and your length of Federal service. If you wish to examine these regulations or to inspect the retention register and records, you should contact the Industrial Relations Division, Bldg. #698. If you are in doubt as to the basis on which this action is taken, or if you feel that an error has been made or that the regulations have been violated, you may discuss the matter with the Assistant Industrial Relations Officer.

3. If you feel that veteran preference rights, or rights under Civil Service Commission's Regulations have not been recognized in your case, you are requested to report in person, accompanied by a representative, if you desire, to the Industrial Relations Division, Bldg. #698, for an interview. If you feel that you have sufficient grounds for an appeal, after such interview, you will be furnished with a form to use in filing your appeal with the Director, 3rd U. S. Civil Service Region, Custom House, 2nd and Chestnut Streets, Phila., Pa.

4. According to our records you have no re-employment rights in any other Federal agency as a result of transfer to this agency, but if you believe you have these rights, you should apply to that agency within 40 days after the effective date of your separation from this activity.

5. If you have any problems incidental to the termination of your employment here, or if you have any questions regarding bond deductions, retirement deductions, etc., contact the Indus-

trial Relations Division for information. You should leave a forwarding address there if you intend to change your address.

By direction of the Comdr:

B. J. Kelley,
B. J. KELLEY.
Industrial Relations Officer.

115 In the District Court of the United States
for the District of Columbia
Civil Action No. 34268

[Title omitted.]
[File endorsement omitted.]

Answer

Filed April 25, 1946

For answer to the complaint filed in this cause defendants state as follows:

FIRST DEFENSE

1. Defendants admit the allegations of paragraphs 1, 2, 3, 5, 6, 8, 9, and 10 of the complaint.

2. Answering paragraph 4 of the complaint, defendants admit that plaintiff was denied the status of a preference eligible, but aver that he was not entitled to such status under the provisions of the Veterans' Preference Act of 1944.

3. Answering paragraph 7 of the complaint, defendants admit the allegations thereof, except that defendants are without information or knowledge sufficient to form a belief as to whether plaintiff will suffer irreparable damage through the loss of his position with the United States Government.

4. Defendants deny the allegations of paragraph 11 of the complaint.

116 SECOND DEFENSE

5. Plaintiff's part-time service as a temporary member of the Coast Guard Reserve did not constitute him an ex-serviceman who had served on active duty in a branch of the armed forces of the United States within the meaning of Section 2 of the Veterans' Preference Act of 1944.

THIRD DEFENSE

6. The complaint fails to state a claim upon which relief can be granted.

Wherefore, defendants pray that the complaint be dismissed and for such other and further relief to which they may be entitled.

John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General,
Edward M. Curran,
EDWARD M. CURRAN,
United States Attorney,
Daniel B. Maher,
DANIEL B. MAHER,
Assistant United States Attorney,
Attorneys for defendants.

I hereby certify that I have this 25 day of June 1946 sent a copy of the foregoing answer, by official United States mail, to Covington, Burling, Rublee, Acheson & Shorb, Union Trust Building, Washington, D. C.

Daniel B. Maher,
DANIEL B. MAHER,
Assistant United States Attorney.

117 In the District Court of the United States
for the District of Columbia

Civil Action File No. 34268

[Title omitted.]
[File endorsement omitted.]

Motion for preliminary hearing

Filed Sept. 9, 1946

Plaintiff moves the court, pursuant to Rule 12 (d) of the Federal Rules of Civil Procedure, to hear and determine before trial the third defense pleaded in defendants' answer herein, on the ground that the issues raised by said defense may be determined separately from the other issues in the case and that if the said issues are decided adversely to plaintiff, it will make it unnecessary to try the other issues in the case.

Wm. Merrick Parker,
WM. MERRICK PARKER,
Attorney for Plaintiff,
701 Union Trust Building, Washington, D. C.

118 In the District Court of the United States
for the District of Columbia

Civil Action File No. 34268

[Title omitted.]
[File endorsement omitted.]

Motion of defendants for summary judgment, notice of motion, and affidavits

Filed Sept. 27, 1946

The defendants, upon the pleadings herein, and upon the annexed affidavits, respectfully move the Court for summary judgment in favor of the defendants on the ground that there are no genuine issues as to any material fact and defendants are entitled to such judgment as a matter of law.

John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General,
Edward M. Curran,
EDWARD M. CURRAN,
United States Attorney,
Attorneys for the Defendants.

119 In the District Court of the United States
for the District of Columbia

Civil Action File No. 34268

HARRY W. HUBICKEY, PLAINTIFF

v.

HARRY B. MITCHELL, LUCILLE FOSTER MCMILLIN, ARTHUR S. FLEMING, DEFENDANTS

Order

Filed Nov. 7, 1946

This cause came on to be heard on motion of defendants for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the court having considered the pleadings and the affidavits of F. A. Crisp, Chester A. Anderson, and Lawson A. Moyer in support of defendants' motion; and having heard oral argument; and having found that there is no genuine issue as to any material fact; and having concluded that plaintiff Harry W.

Hubickey is entitled to judgment as a matter of law, it is by the court this 7th day of November 1946:

Adjudged and declared: That plaintiff, as a man who served on active duty, although temporary, intermittent, and without pay, in the United States Coast Guard Reserve during a portion of World War II and who has been honorably separated from the Coast Guard Reserve which was a portion or branch of the armed services of the United States, is entitled to the preference in employment created by the Veterans' Preference Act of 1944.

120 And it is further adjudged, ordered, and decreed: That defendants Harry B. Mitchell, Lucille Foster McMillin, and Arthur S. Flemming shall forthwith classify plaintiff Harry W. Hubickey as a preference eligible pursuant to the Veterans' Preference Act of 1944 (5 United States Code, Section 851 et seq.) and that said defendants having granted said preference to said plaintiff shall thereafter refrain from denying preference eligibility to plaintiff or from in any manner taking any action which will deny to plaintiff such status.

T. ALAN GOLDSBOROUGH,
Justice.

Not objected to as to form.

JOHN F. SONNETT,
Attorney for Defendants.

121 In the District Court of the United States

Civil Action No. 34267

Civil Action No. 34268

[Titles omitted.]

WASHINGTON, D. C., *October 17, 1946.*

The above-entitled causes came on for hearing on a motion for summary judgment before Hon. T. Alan Goldsborough, Associate Justice, at 2 o'clock p. m.

122 Appearances: On behalf of the plaintiffs: John Burling, Esq. On behalf of the defendants: Frank Hayden, Esq., Ralph B. Gregg, Esq., of the Indiana Bar, representing the American Legion. Arthur M. Gladstone, Esq., of the New York Bar, representing the Coast Guard League.

Conclusion of the court
(After oral argument)

The COURT. Gentlemen, I don't have any difficulty about this case at all. The statute is as follows and includes among those entitled to Federal Employment preference "those ex-service men

and women who have served on active duty in any branch of the armed forces of the United States during any war or any campaign or expedition for which a campaign badge has been authorized, and have been separated therefrom under honorable conditions."

Now, of course, it is not contended that under the letter of what I have just read there can be any doubt that these petitioners are included, but the contention is made that the Court has the right by construction, to say that Congres could not have had in mind individuals of the class of these plaintiffs, because of the fact that in practice, while they could have been—after they had once
123 signed up—they could have been called into active and continuous service as a matter of practice they only served during certain hours of the night, retaining their civilian positions.

Now, what right have I to place such a construction upon the Act?

These men when they were called out were admittedly sailors, and during the time they were out—I used that expression "at night" in this service they were subject in every respect to the duties and obligations of being sailors—there were not "guerillas," they would have been entitled to the protection under international law that a sailor is entitled to.

Now, of course, when an Act of Congress is subject to construction or interpretation and the Court can give an interpretation which the Court feels is carrying out the real purpose of Congress, the Court has the right to interpret and construe it. There is no doubt whatever in the Court's mind that there is no room for construction in Section 4 of this Act providing for persons entitled to Federal Employment preference and that the claimants here come within the terms of that section, and the relief of summary judgment now requested by the plaintiffs will be granted.

124 REPORTER'S CERTIFICATE

I, O. H. Frost, one of the official reporters for the District Court of the United States for the District of Columbia, hereby certify that the foregoing is the official transcript of the Court's conclusions in the above-entitled causes.

O. H. FROST,
Official Reporter.

125 In the District Court of the United States
for the District of Columbia

Civil Action No. 34268

[Title omitted.]
[File endorsement omitted.]

Notice of appeal

Filed Nov. 19, 1946

Notice is hereby given that Harry B. Mitchell, Lucille Foster McMillin, and Arthur S. Flemming, the defendants above named, hereby appeal to the Court of Appeals for the District of Columbia from the order of injunction entered in this action on November 6, 1946.

Dated November 19, 1946.

John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General.

George Morris Fay,
GEORGE MORRIS FAY,
United States Attorney,
Attorneys for the Defendants.

Copies sent to: Gerhard Gesell, Union Trust Building. William Merrick Parker, Union Trust Building.

126 In the United States Court of Appeals for the District of Columbia

No. 9446, January Term, 1947

HARRY B. MITCHELL ET AL., APPELLANTS

vs.

JACK W. COHEN, APPELLEE

No. 9447, January Term, 1947

HARRY B. MITCHELL ET AL., APPELLANTS

vs.

HARRY W. HUBICKEY, APPELLEE

Minute entry

Jan. 24, 1947

Argument commenced by Mr. Richard E. Guggenheim, attorney for appellants, continued by Mr. Spencer Gordon, attorney for appellees, and concluded by Mr. Richard E. Guggenheim.

127 In United States Court of Appeals, District of Columbia

[File endorsement omitted.]

No. 9446

HARRY B. MITCHELL, FRANCES PERKINS, AND ARTHUR S. FLEMMING, INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, APPELLANTS

v.

JACK W. COHEN, APPELLEE

No. 9447

HARRY B. MITCHELL, FRANCES PERKINS, AND ARTHUR S. FLEMMING, INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, APPELLANTS

v.

HARRY W. HUBICKEY, APPELLEE

Appeals from the District Court of the United States for the District of Columbia

Argued January 24, 1947—Decided March 24, 1947

Mr. Richard E. Guggenheim, Attorney, Department of Justice, with whom Mr. J. Francis Hayden, Special Assistant to the Attorney General, Mr. Ellis Lyons, Attorney, Department of Justice, and Mr. George Morris Fay, United States Attorney, were on the brief, for appellants.

Mr. Spencer Gordon, with whom Mr. Gerhard A. Gesell was on the brief, for appellees.

Messrs. John Lewis Smith and Joseph J. Malloy, on behalf of the American Legion, filed a brief as amicus curiae, urging reversal.

Messrs. Robert P. Smith, William B. Ristig and Robert V. Smith, on behalf of James A. MacKenzie, filed a brief as amicus curiae, urging affirmance.

Before EDGERTON, WILBUR K. MILLER, and PRETTYMAN, JJ.

Opinion

Filed March 24, 1947

PRETTYMAN, J.: Appellees, having been denied veterans' preferences and having been, or being about to be, discharged
128 from their civilian positions in the War and Navy Depart-

ments; respectively, brought civil actions for injunctions against the Civil Service Commission and for declaratory judgments. Their claims were for preference in federal employment under the Veterans' Preference Act of 1944.[1] Summary judgments were entered for them. The members of the Commission, named as defendants individually and officially, appealed. The cases were consolidated for argument and decision in the court below and also in this court.

The Act provides that in certification for appointment, and in retention in civilian positions in Government employ, preference shall be given to "those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, * * * and have been separated therefrom under honorable conditions."[2]

It is not disputed by the Commission that appellees served on active duty with a branch of the armed forces during the recent war; nor is it disputed that they were separated therefrom under honorable conditions. So much is specifically stated in its brief. The Commission says that appellees are not "ex-servicemen." It says that the word is not defined in the statute and has no clear-cut legal significance when separated from its context, but that when read with the Act as a whole its meaning is quite clear.

These appellees were enrolled as temporary members of the United States Coast Guard Reserve. This was by statute a component part of the Coast Guard, in war a part of the Navy; and its organization, general duties and the powers of the Commandant relative thereto were designated by statute.[3] Appellees took the oath of allegiance required of regular members of the Coast Guard. The period of enrollment was the duration of the war. They enrolled for, and were assigned to, duty in the Volunteer Port Security Force. As such, they relieved regular Coast Guard personnel in the protection of ports and waterfronts and patrolled those waterfronts. A number of them were injured and killed in the line of duty. They were on active duty only as directed and for a minimum of twelve hours a week. Their active duty was, in fact, part-time. While on duty, and en route to and from duty, they wore regular Coast Guard uniforms; had military status; were vested with the same powers and authority as members of the regular Coast Guard with the same rank, grade or rating; were subject to the laws, regulations and orders of the Coast Guard and to its disciplinary action; received food and quarters; and, in case of sickness or disease contracted while on duty, were entitled to the same treatment as were regular Coast

[1] Act of June 27, 1944, 58 Stat. 387, 5 U. S. C. A. § 851.
[2] Sec. 2 of the Act.
[3] Act of Feb. 19, 1941, 55 Stat. 11, as amended, 14 U. S. C. A. § 301 et seq.

129 Guardsmen. They received no compensation for their service; were not subject to transfer without their consent; were not exempt from registration or liability for service under the Selective Service Act; were permitted to retain civilian employment; and, in case of injury or death, were entitled to only the benefits bestowed upon civilian employees.

The Commission says that three of the foregoing features of appellees' service are sufficient to bar their preference: (1) that they could retain their civilian employment; (2) that they remained subject to the draft; and (3) that they could be transferred only with their consent. It says that because of these features appellees are not "ex-servicemen," although they served on active duty with a branch of the armed forces during the war. It says that "The question of who is a veteran cannot be defined by easy formula" and that "the scope of the group included in any such statute can only be defined in terms of purpose of that statute."

Either of two considerations determines the matter, in our opinion. In the first place, we think it plain that one who has taken the military oath of service, who is a member of a component of the armed forces, who is subject to and actually engaged in military duty, and who is governed by the rules of military discipline, is a "serviceman". The problem is not unlike that decided in United States v. Tyler.[4] The question there was whether an army officer who had been retired for more than twenty years, was "in the service". The Court said:

"It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still not in the military service.

"If Congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it did not discharge them from their other obligations as part of the Army of the United States. * * *"[5]

In United States v. Morton,[6] the Supreme Court held that the "service" of an army officer began when he executed the sworn

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[4] 105 U. S. 244, 26 L. Ed. 985 (1882).

[5] See also to the same effect Wood v. United States, 107 U. S. 414, 417, 27 L. Ed. 542, 2 S. Ct. 551 (1883); Badeau v. United States, 130 U. S. 439, 32 L. Ed. 997, 9 S. Ct. 579 (1889); Kahn v. Anderson, 255 U. S. 1, 65 L. Ed. 469, 41 S. Ct. 224 (1921); 29 Op. Atty. Gen. 397 (1912); Morgenthau v. Barrett, 71 App. D. C. 148, 108 F. 2d 481 (1939). The latter decision led to an amendment of Sec. 113 of the Criminal Code by an Act of Oct. 8, 1940, 54 Stat. 1021, 18 U. S. C. A. § 203.

[6] 112 U. S. 1, 28 L. Ed. 613, 5 S. Ct. 1 (1884).

agreement to serve and took the oath of office as a cadet at West Point. The Supreme Court had before it, in Billings v. Truesdell,[7] the question as to when a registrant is inducted into
130 service, and held that he is actually inducted when "he undergoes whatever ceremony or requirements of admission the War Department has prescribed," which in the recent war was "a short, dignified ceremony in which the men are administered the oath."

Similar problems have frequently arisen in respect to Government employ in civilian capacity. Criminal statutes[8] impose certain restrictions upon such persons, and the Attorney General and the courts have had to determine from time to time the status of particular ones. The question arose in acute form concerning the members of War Price and Rationing Boards and the Selective Service Boards. Their services were part-time, voluntary and without compensation, but an oath of office was required and the appointments involved governmental duties.[9] The Attorney General held[10] that a member of a War Price and Rationing Board was an "officer or clerk in the employ of the United States" within the meaning of Section 113 of the Criminal Code. That Congress regarded the members of the Selective Service Boards, Rationing Boards, and Alien Enemy Hearing Boards as officers or clerks in the employ of the United States, regardless of the temporary, voluntary and unpaid character of their services, is shown by the enactment of statutes specifically exempting them from the criminal statutes applicable to such officers and employees.[11]

Thus, distinctions between those in and those not in service, heretofore proposed in other situations, based upon part-time, voluntary or unpaid service, have been rejected both as to military service and as to Government "employ." It would unsettle many established rules if a departure from the simple test were now inaugurated.

The Commission says that appellees have fewer indicia of veterans' status than do many civilians who served with the armed forces. It points to Red Cross representatives who accompanied combat troops in the field, civilian technicians stationed in combat zones, and members of the Civil Air Patrol as examples of those with greater indicia of service status. But it seems to us that

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[7] 321 U. S. 542, 88 L. Ed. 917, 64 S. Ct. 737 (1944).
[8] Secs. 109 and 113 of the Criminal Code, 18 U. S. C. A. §§ 198, 203.
[9] See Selective Service Regulations (3d printing, 2d ed.) pars. 602.2, 602.4, as to Selective Service Boards; and Sec. 201 (a) of the Emergency Price Control Act of 1942, 56 Stat. 29, 50 U. S. C. A. App. § 921 (a), and O. P. A. Regs. 1315.201, 7 F. R. 73, in respect to War Price and Rationing Boards.
[10] 40 Op. Atty. Gen., Op. No. 74 (Dec. 9, 1943).
[11] Act of May 5, 1941, 55 Stat. 150, as amended Dec. 28, 1941, 55 Stat. 861, and Dec. 20, 1944, 58 Stat. 838; Act of April 4, 1944, 58 Stat. 189.

the adoption of any such evaluation of comparative indicia, instead of the simple established test, for the difference between a civilian and a serviceman, would lead at once into a hopeless morass. The civilians mentioned by the Commission have more of these suggested indicia than do army officers or men who performed "paper work" in offices in this country and lived with their families.
131 But nobody would argue that the latter were not in the service. Also, these temporary Coast Guardsmen have greater indicia of that sort than do many of those officers and men. They performed dangerous active duty offshore, and a number of them were killed. To distinguish between those in and those not in service by a comparison of indicia as suggested by the Commission would be an impossible task and wholly unjustified by the simple statutory word "servicemen."

The Commission says that the limitation on appellees' service, in that they could not be transferred without their consent, shows that they were not in the service. But there were limited services even for men inducted by Selective Service processes. There was a limited noncombatant service, and limited service due to physical causes, such as "cannot march," "cannot do heavy work," "insufficient vision for fine work," and "can do sedentary work." [12] No one would contend that such people, having been inducted, were not in the service. The Women's Reserve of the Navy was a branch of the Naval Reserve,[13] which was a component part of the United States Navy,[14] but its duties were restricted by statute. Its members could not be assigned to duty on board vessels of the Navy and could be assigned to duty outside the continental United States only upon their prior request.[15] It is certainly generally understood that this limitation upon service did not negative the Waves' "service." There was also a Limited Service Marine Corps Reserve which was a part of the Marine Corps Reserve and a component part of the United States Marine Corps.[16] Thus, it is clear beyond question that, as a generality, limited service is nevertheless service. What then is the critical difference between a limitation which prevents transfer of station without consent, and one which prevents transfer to a station outside the United States without consent? Or between a geographical limitation and a functional limitation? The Commission does not suggest, and we do not perceive, any critical distinction between types of limitation which could be the criterion for holding some limited service to be service, but contrariwise as to other such service. The

[12] Classifications I–A–O, I–B, I–B–O, Selective Service Regulations (1st ed.) pars. 328, 343, 364, 604, 613.
[13] U. S. C. A. § 857.
[14] 34 U. S. C. A. § 853.
[15] 34 U. S. C. A. § 857c.
[16] 34 U. S. C. A. § 853 (a) and (b).

word "servicemen" does not, in our opinion, have any inherent restriction based upon different types of limitation upon service. The limitations upon appellees' service were not inherent in the organization as created by statute but were by way of prescription of the Commandant and the subsequent agreement of the members.

The statute gave the Commandant, with the approval of
132 the Secretary, power to enroll members and to prescribe their duties, "including but not limited to part-time and intermittent active duty with or without pay."[17] That these appellees were on part-time active duty and without pay was due to the Commandant's directions, formally agreed to by them upon enrollment. He enrolled temporary reservists for various classes of duty, prescribed by him in general orders. Some classes received pay, and some did not; some were part-time, and some were not; some were subject to transfer of station, and some were not. But all were temporary members of the Coast Guard Reserve, enrolled, as the statute provides,[18] "for duty under such conditions as he [the Commandant] may prescribe." Status, as military or civilian, cannot be determined by a formula derived from a commanding officer's prescription of duties for particular members of his command. So much is obvious. This command itself was by statute a component of the armed forces. What the commanding officer did with its members is immaterial to their status.

The Commission does not suggest any formula for segregating members of a component of the armed forces into those in and those not in the service. It merely advances reasons for denying preference to this particular class. We are not told what weight the Commission would give the voluntary feature, or the nonpay feature, or the part-time feature. No general regulation applicable to all classes has been proposed, so far as we are advised.

That the service of these temporary reservists was part-time is immaterial, both upon the precedents we have cited and upon reason. A man who is in the service for one week is certainly in the service. One who is there half or a fourth of his time is certainly there for that time. He is a serviceman of some variety. There may be varieties of servicemen, but this statute merely says "ex-servicemen."

The contention of the Commission that Congress did not intend to confer preference on those who continued normal civilian employment during the war, is completely refuted by the fact that in the same paragraph of the Act Congress gave the same preference eligibility to the unmarried widows of deceased servicemen. Generally speaking, the wives of servicemen continued normal

[17] 14 U. S. C. A. § 307.
[18] 14 U. S. C. A. § 307.

civilian employment during the war. And, in any event, Congress wrote no such restriction as the Commission now proposes.

The Commission points to the provision that temporary reservists in the Coast Guard were not exempted from registration and liability for service under Selective Service as were other members of the Reserve. But the Commission tells us in its brief that it has granted preference to one class of these temporary
133 reservists. Moreover, that a man in one type of service is liable to anther type is not a denial that he is in the service; for example, as in United States v. Tyler, supra, that a retired army officer might be called to active, full-time, paid duty did not negative his service status while he was retired.

The second conclusive consideration upon the question is the administrative and legislative history of the question. On April 4, 1944, the Civil Service Commission issued a Circular Letter (No. 4145), in which it held that temporary reservists under the Coast Guard Auxiliary and Reserve Act of 1941, whether full-time, part-time, or intermittently, either with or without pay, were considered to be in active service and were entitled to preference. The Veterans' Preference Act became effective June 27, 1944. It contained a provision that "this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof." [19] On November 4, 1944, the Commission reversed its former ruling and withdrew the preference,[20] giving rise to the present litigation. Both appellees were enrolled in the Coast Guard before this latter ruling. It requires no elaboration to emphasize the conclusion that this history supports appellees' contentions as to the meaning of the Act.

Amicus curiae American Legion says that in many respects the status of appellees is similar to that of those who formerly served in the Women's Army Auxiliary Corps under Public Law 554, 77th Cong., 2d Sess. (1942).[21] The illustration well serves the point. That Act of May 14, 1942, specifically provided that "The corps shall not be a part of the Army, * * *." [22] But that Act was repealed July 1, 1943, and a new Act passed which provided that "There is hereby established in the Army of the United States, * * * a component to be known as the 'Women's Army Corps'. * * * The enlisted personnel of such corps shall consist of women * * * who are enlisted in the Army of the United States. * * *" [23] Thus, the former corps, the WAAC,

[19] Sec. 18 of the Act, 5 U. S. C. A. § 867.
[20] Departmental Circular 508.
[21] 56 Stat. 278.
[22] Sec. 12 of the Act, 56 Stat. 281.
[23] 57 Stat. 371, 50 U. S. C. A. App. §§ 1551–1555.

was specifically, by statute, not in the Army, whereas the latter corps, the WAC, was. It could hardly be denied that the members of the latter were in the service.

We hold that a person who has taken the oath as a member of a component of the armed forces and, as such, has been on naval duty, in the regular uniform of the command, with the perquisites of rank of the regular members, and has been subject to military discipline and liable to separation under dishonorable con-
134 ditions, is an ex-serviceman. In the language of the Court in United States v. Tyler, supra, it would be impossible to hold that such a person is not in the service. It would indeed be an anomaly to hold that a petty officer in command of a Coast Guard vessel on antisubmarine duty offshore was not in the service while the men under him were.

The Commission presents arguments of policy as to why these temporary reservists should not be granted the preference privilege. Those considerations are not for the courts. Congress used a simple word, "ex-servicemen," and made two limitations upon its grant of the privilege to them, namely, that they must have served on active duty with the armed forces in war, and that they must have been separated from the service under honorable conditions. The courts cannot write further exceptions into the statute. They must apply what Congress has provided. Views as to other policies should be presented to the Congress, together with such recommendations as the Commission may deem advisable. The doors of Congress are open to the Commission, and the members are readily accessible. If the Congress wished to make further exceptions to the privilege, it could, and no doubt would, describe them with particularity. If it wished to exclude the temporary reservists of the Coast Guard from the preference, it could do so, by name and simply; but the courts cannot. The courts cannot rewrite the statute, and they should not inaugurate the confusion which would be caused by interpreting the simple word "ex-servicemen" by some unrestricted evaluation of indicia based on the time spent on active duty, the nature of the Commandant's prescription of duties, or the extent or existence of pay. The treatment to be given ex-servicemen is peculiarly a legislative problem. It is involved in many statutes. When Congress says simply "ex-servicemen," and then excludes certain ones, it is not for the Commission or the courts to set up other standards. Not only are the courts not empowered to rewrite plain terms in a statute, but they are not equipped to write formulae of general application upon a subject of so great variation in its facts.

(Affirmed.)

Dissenting opinion

EDGERTON, J., dissenting: The Commission's understanding of the term "ex-servicemen" is in accordance with ordinary usage. The court's construction conflicts with ordinary usage. When one speaks of ex-servicemen one is not speaking of men who always remained subject to draft; who lived at home and could not, except through the machinery of the draft, be ordered to leave home; who constantly carried on their regular civilian occupations as usual; and whose connection with the armed forces involved only part-time unpaid work which entitled them only to civilian benefits in case they were injured. The court's basic error is in its assumption that the meaning of the term does not depend on
135 usage but can be found by analysis. Arguing that if men performed service they must be ex-servicemen is much like arguing that if men work they must be workmen and if mothers are grand they are grandmothers.

The context also conflicts with the court's construction. That construction makes the statutory language, "those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war," mean just what it would have meant if Congress had used the word "persons" instead of the phrase "ex-servicemen and women." It is unlikely that Congress used the somewhat awkward phrase as a mere synonym for the simple word.

The Commission's construction, besides being the one that usage and context require, is "also more consonant with the legislative purpose"[1] which is stated in the title of the Act: "to give honorably discharged veterans, their widows, and the wives of disabled veterans, * * * preference in employment * * *." Congress intended to aid in the rehabilitation and reemployment of "veterans." It is paradoxical to suggest that Congress intended to include, and aid in the rehabilitation and reemployment of, a whole class of men whose regular employment and way of life were never interrupted. To extend employment preference to men in appellees' situation will weaken the competitive position of the veterans whom Congress intended to help. It will also weaken the competitive position of the munitions makers, and the many other employees both public and private, who did essential war work but have been given no preference.

Plainly a "preference eligible" is a person eligible for employment and entitled to preference. The only men to whom the act gives a preference are "ex-servicemen." No one contends that appellees were, or ever had been, ex-servicemen either on June 27,

[1] Board of Governors of Federal Reserve System v. Agnew, U. S. 15 L. W. 4122, 4123, decided Jan. 6, 1947.

1944, when the act was passed, or on November 4, 1944, when the Commission corrected its erroneous ruling. On both those dates appellees' service, such as it was, was still going on. Since appellees were not and never had been ex-servicemen on either date, they were not and never had been preference eligibles on either date. Clearly, therefore, they are not within the proviso that "this act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof." [2] It is unnecessary to consider whether "rights" could, in any case, have been "granted" by a Commission ruling not in accordance with law.

136 In United States Court of Appeals
for the District of Columbia

No. 9446—January Term, 1947.

[File endorsement omitted.]

HARRY B. MITCHELL, ET AL., INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, APPELLANTS

vs.

JACK W. COHEN, APPELLEE

No. 9447—January Term, 1947

HARRY B. MITCHELL, ET AL., INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, APPELLANTS

vs.

HARRY W. HUBICKEY, APPELLEE

Appeals from the District Court of the United States for the District of Columbia

Before EDGERTON, WILBUR K. MILLER, and PRETTYMAN, JJ.

Judgment

Filed March 24, 1947

These appeals came on to be heard on the transcripts of the record from the District Court of the United States for the District of Columbia, and were argued by counsel.

[2] 58 Stat. 391, § 18, 5 U. S. C. Supp. V, § 867.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgments of the said District Court appealed from in these causes be, and the same are hereby affirmed.

Per Mr. Justice PRETTYMAN.

Dated March 24, 1947.

Dissenting opinion by Mr. Justice Edgerton.

137 In United States Court of Appeals
for the District of Columbia

No. 9446

No. 9447

[Titles omitted.]

[File endorsement omitted.]

Designation of record

Filed May 15, 1947

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix.
2. Minute entry of argument.
3. Opinion of Court of Appeals.
4. Judgment.
5. This designation.
6. Clerk's certificate.

George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General.

Service of copy of the above designation of record in the above-entitled case is hereby acknowledged this 15th day of May 1947.

SPENCER GORDON,
Of Counsel for Appellee.

139 In the Supreme Court of the United States

No. 9446

No. 9447

[Titles omitted.]

Stipulation as to record

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties of the above-entitled case that:

1. For the purpose of the petition for a writ of certiorari the printed record shall consist of the following:

a. The Joint Appendix.

b. The proceedings had before the United States Court of Appeals for the District of Columbia as set forth in the Designation of Record filed by the petitioner.

2. Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia to file with the Clerk of the Supreme Court the entire transcript of the record and original exhibits in the Court of Appeals for the District of Columbia, and the parties may refer in their briefs in connection with the petitioner for certiorari to the transcript and exhibits including any parts which have not been printed.

3. In the event the petition for writ of certiorari is granted, the printed record shall consist of the material specified in
140 paragraph (1) above and such portions of the entire transcript of record as the parties may designate.

George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General.

May 15, 1947.

GERHARD A. GESELL,
Of Counsel for Appellee.

May 19, 1947.

141 In the Supreme Court of the United States

No. 130

No. 131

[Titles omitted.]

Stipulation designating portions of the record to be printed

Filed Nov. 5, 1947

It is hereby stipulated and agreed by and between counsel for the respective parties that:

A. The following portions of the transcript of the record in the above-entitled causes shall be printed:

No. 130

	Pages of the transcript
1. Complaint and exhibits	1–11
2. Answer	12–13
3. Plaintiffs' motion for summary judgment	14–15
4. Affidavit of Jack W. Cohen	16–17
5. Motion of Defendants for Summary Judgment, Notice of Motion, and Affidavits	18

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142 6. Affidavit of Chester A. Anderson 19–22
7. Affidavit of Lawson A. Moyer 23–26
8. Exhibit 1 to 4, inclusive, to Moyer affidavit 27–34
9. Exhibit 5 to Moyer affidavit (except the portion of page 36 of the transcript beginning with "Section 23 (a)—Deductions from Gross Income: Expenses" and continuing to the end of the page) 35–36
10. Exhibit 6 to the Moyer affidavit 37–46
11. Affidavit of F. A. Crisp 47–48
12. Memorandum to Acting Secretary of the Navy, dated 22 August 1944 50–52
13. Second endorsement of 16 Sept. 1944 to Memo SECP-290, wh. of 22 August 1944, to Acting Sec. Nav 53–55
14. Order of the District Court, filed October 25, 1946 93–94
15. Notice of Appeal 100

No. 131

1. Complaint and Exhibits 1–12
2. Answer 13–14
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4. Motion of Defendants for Summary Judgment, Notice of Motion, and Affidavits 16
5. Order of the District Court 91–92
6. Notice of Appeal 98

Nos. 130 and 131 (combined)

1. Conclusions of the Court (after Oral Argument), October 17, 1946. (No. 130, pp. 95–99) (No. 131, pp. 93–97).
2. Record of proceedings had before the United States Court of Appeals for the District of Columbia including:
a. Minute entry of argument.
b. Opinion of Court of Appeals.
c. Judgment.
143 3. Designation of Record filed in Court of Appeals dated May 15, 1947.
4. Stipulation filed in this Court dated May 15, 1947 and May 19, 1947.
5. This stipulation.

B. The affidavits of Chester A. Anderson, Lawson A. Moyer, and F. A. Crisp, and exhibits thereto, forming part of the record in No. 130 and designated above to be printed are identical with the affidavits of Chester A. Anderson, Lawson A. Moyer, and F. A. Crisp, and exhibits thereto, which form part of the record in No. 131. The latter affidavits and exhibits are not designated

to be printed in order to avoid unnecessary duplication, but it is agreed that the said affidavits and exhibits form part of the record in both cases and in both cases the parties may refer in briefs or argument to these affidavits and exhibits.

Philip B. Perlman,
PHILIP B. PERLMAN,
Solicitor General.
GERHARD A. GESELL,
Counsel for Respondents.

Dated November 3rd, 1947.

144 [File endorsement omitted.]

145 Supreme Court of the United States

No. 130—October Term, 1947

Order allowing certiorari

Filed October 13, 1947

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

146 Supreme Court of the United States

No. 131—October Term, 1947

Order allowing certiorari

Filed October 13, 1947

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File Nos. 52351, 52352. U. S. Court of Appeals, District of Columbia. Term No. 130. Harry B. Mitchell, Frances Perkins, Arthur S. Fleming, Individually and as Members of the Civil Service Commission, Petitioners vs. Jack W. Cohen. Term No. 131. Harry B. Mitchell, Frances Perkins, Arthur S. Fleming, Individually and as Members of the Civil Service Commission, Petitioners vs. Harry W. Hubickey. Petition for writs of certiorari and exhibit thereto. Filed June 13, 1947. Term Nos. 130 O. T. 1947, 131 O. T. 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

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Nos. ~~1407 1408~~ 130-131

In the Supreme Court of the United States

OCTOBER TERM, 1946

HARRY B. MITCHELL, FRANCES PERKINS, ARTHUR S. FLEMMING, INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, PETITIONERS

v.

JACK W. COHEN

HARRY B. MITCHELL, FRANCES PERKINS, ARTHUR S. FLEMMING, INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, PETITIONERS

v.

HARRY W. HUBICKEY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. —

HARRY B. MITCHELL, FRANCES PERKINS, ARTHUR S. FLEMMING, INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, PETITIONERS

v.

JACK W. COHEN

No. —

HARRY B. MITCHELL, FRANCES PERKINS, ARTHUR S. FLEMMING, INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, PETITIONERS

v.

HARRY W. HUBICKEY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Acting Solicitor General, on behalf of Harry B. Mitchell, Frances Perkins, and Arthur S. Flemming, individually and as members of the Civil Service Commission, prays that writs of certiorari issue to review the judgments entered in these cases on March 24, 1947, by the United

States Court of Appeals for the District of Columbia.

OPINIONS BELOW

The memorandum opinion of the District Court (R. 31–32) is not reported. The majority and dissenting opinions in the Court of Appeals (R. 37–45) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 1947 (R. 46). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether members of the Volunteer Port Security Force, a branch of the Temporary Coast Guard Reserve, who were assigned duty periods (here of less than six hours a week) in order to interfere as little as possible with their hours of regular civilian employment, who were permitted to and did continue their civilian employment during their enrollment, who could be disenrolled at their own request upon representation that their duty assignments conflicted with such civilian employment, who were not subject while on duty to transfer away from their homes without their consent, and who remained at all times subject to the draft provisions of the Selective Training and Service Act of 1940, are entitled to preference

in federal employment as "ex-servicemen" within the meaning of the Veterans' Preference Act of 1944.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the statutes and regulations involved are set forth in the Appendix, *infra*, pp. 23–25.

STATEMENT

The essential facts in these cases, which are substantially identical and are not in dispute, are as follows:

Respondent Cohen was enrolled as a temporary member of the United States Coast Guard Reserve on April 13, 1944, to serve as a member of the Volunteer Port Security Force and was assigned to duty with the Captain of the Port, Washington, D. C. (R. 14). He served only on part-time duty without compensation and without interruption of his civilian employment with the Government (R. 2). He was disenrolled as a temporary member of the Reserve on September 5, 1945, having served on active duty fifty-eight days, for a total service of 398 hours (R. 14–15). Respondent Hubickey was enrolled as a temporary member of the United States Coast Guard Reserve on October 18, 1944, to serve as a member of the Volunteer Port Security Force, and was assigned to duty with the Captain of the Port, Philadelphia, Pennsylvania. He served only on part-time duty without compensation, and without

interruption of his civilian employment with the Government (R. 20). He was disenrolled as a temporary member of the Reserve on September 30, 1945, having served on active duty thirty-two days, for a total service of 250 hours.

Pursuant to the authority set forth in Section 207 of the Coast Guard Reserve Act, Act of February 19, 1941, c. 8, 55 Stat. 12, as amended (Appendix, *infra*, pp. 24–25), the Commandant, United States Coast Guard, undertook to enroll as temporary members of the Coast Guard Reserve approximately 70,000 persons for such duty as was prescribed in the various contracts of enrollment (R. 12). The duties of these members ranged from full-time active duty, with military pay and allowances, to part-time or intermittent duty without pay and allowances other than for uniforms (R. 12–14).[1] Under the terms of enrollment to which respondents and other members of the Volunteer Port Security Force subscribed,

[1] Members of the Coast Guard Reserve (Temporary) were enrolled according to the following classifications (R. 12–14):

(1) For full-time duty with military pay and allowances. Little, if any, distinction was made between this group and regular members of the Reserve of similar rank or ratings, with the exception that the former was generally limited to the performance of duty at shore stations within the continental limits of the United States and aboard vessels operating from continental shore bases. We do not contest the right of members of this branch of the Reserve to the benefits of the Veterans' Preference Act.

(2) For part-time or intermittent duty without pay and allowances other than for uniforms. The service of these personnel was purely voluntary and their only compensation

they continued their regular civilian employment and were not subject to being transferred from the place they lived without their consent (R. 14). It was the practice of the Coast Guard to assign duty periods for the convenience of the members of the Volunteer Port Security Force so as to interfere as little as possible with the hours of their regular civilian employment, and many mem-

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was a uniform allowance if they consistently served 12 hours per week. This was known as the Volunteer Port Security Force, of which respondents were members. There were some 70,000 men enrolled in the temporary reserve. Of this number, the largest single group comprised the Volunteer Port Security Force, although there is no record of its exact number.

(3) For pilots without pay and allowance other than for uniforms but paid by their own companies. Pilots throughout the country were enrolled and put in uniforms in officer rank as a matter of military convenience. This made it possible to exercise a certain amount of military control over these men in time of war, and to clothe them in some military authority.

(4) For officers of Great Lakes vessels without pay and allowance other than for uniforms but paid by their own companies. These personnel were enrolled as temporary officers in the Coast Guard Reserve in an effort to prevent sabotage on Great Lakes vessels.

(5) For Coast Guard police without pay and allowance. These personnel were enrolled to afford protection to war plants. The program was abandoned by the Navy in February 1944, upon the advice of Congress.

(6) For Civil Service employees of the Coast Guard enrolled for full-time active duty without pay other than compensation of their civilian positions. Civilian key employees of the Coast Guard were enrolled as temporary members of the reserve as a matter of administrative convenience. They continued to perform the same duties, retain their civil service status, and receive civil service pay.

bers of the Volunteer Port Security Force were disenrolled at their own request upon representations that their duty assignments conflicted with their civilian employment (R. 14). These members were obligated to be on active duty "only as directed by competent authority for a minimum of 12 hours per week"[1] (R. 7). They received no pay for such duty; however, they did, in most cases, receive a uniform allowance, and, in some instances, food or subsistence allowance while on active duty (R. 14).

Members of the Volunteer Port Security Force were not exempted from the Selective Training and Service Act of 1940, as amended, and many were in fact drafted or did enlist in the regular or regular reserve components of the armed forces, thereby necessitating their disenrollment as temporary members of the Coast Guard Reserve (R. 14). They were accorded the same hospital treatment as members of the Regular Reserve for illness or disease contracted while on duty. However, in case of physical injury or death incurred in line of duty, they were entitled only to the benefits granted to federal civilian employees by the United States Employees Compensation Commission (R. 28). Members of this group did not receive the benefits of National Life Insurance (R. 28). The certificates of enrollment for members of the Volunteer Port Security Force provided that their military status should attach only during periods when they were actually engaged on

active duty or en route to and from such duty (R. 7). While on active duty they wore the uniform and were vested with the same authority as members of the regular Coast Guard of similar rank, grade, or rating, and were subject to the laws, regulations, and orders of the Coast Guard and to its disciplinary action (R. 7). Upon severance they did not receive an honorable discharge, but were issued a "Certificate of Disenrollment" (R. 8); they were not entitled to mustering-out pay (R. 15–18).

On April 4, 1944, the Civil Service Commission issued Circular Letter No. 4145 to Regional Directors and Division Chiefs of the Commission, which provided that active duty performed by temporary members of the Coast Guard Reserve, whether full time, part time, or intermittently, either with or without pay, including Government employees enrolled without pay other than the compensation of their civilian positions, constituted active duty as distinguished from training duty and entitled the member performing such duty to preference benefits (R. 3–4). A week later, however, on April 11, 1944, the Secretary of the Navy determined that only those temporary Coast Guard Reservists who were performing full-time active duty at full pay and allowances at shore stations or on Coast Guard vessels were entitled to the benefits of the Mustering-Out Payment Act of February 3, 1944, c. 9, 58 Stat. 8 (38

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U. S. C., Supp. V, 691a) (R. 15–18).[2] Subsequently, on November 4, 1944, and pursuant to a recommendation of the Acting Secretary of the Navy, the Civil Service Commission modified its earlier ruling of April 4, 1944, and provided that only those temporary Coast Guard Reservists performing full-time duty with pay and allowances at shore stations or aboard Coast Guard vessels were entitled to veterans' preference under the terms of the Veterans' Preference Act of 1944, Appendix, *infra*, pp. 23–24 (R. 5–6, 22–23).

In accordance with this ruling of November 4, 1944, respondents were denied veterans' preference by the Civil Service Commission (R. 1, 19). Thereafter, due to general reductions in forces, respondent Cohen was discharged from his position as a civilian economist, War Department (R. 2), while respondent Hubickey was notified that he would be discharged from his position as a civilian naval architect, Navy Department (R. 20). Respondents instituted these actions, praying that petitioners be ordered to classify them as preference eligibles, and that the court adjudge and declare them entitled to the status of preference eligibles under the provisions of the Veterans' Preference Act of 1944, Appendix, *infra*, pp. 23–24 (R. 1–9, 19–24). Both petitioners and re-

[2] The Judge Advocate General of the Navy held that any other construction of that Act would be inconsistent with the purposes of that Act, namely, to help servicemen and women tide over the difficult period of readjustment from military to civilian life (R. 18).

spondents moved for summary judgment and the District Court granted judgments for respondents (R. 32–34). Upon appeal, the court below affirmed (R. 46), Mr. Justice Edgerton dissenting.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that temporary members of the Volunteer Port Security Force of the Coast Guard Reserve are entitled to preference in federal employment.

2. In failing to give effect to the plain intent of Congress, as disclosed by the legislative history of the Act, as to the type of ex-serviceman intended to be entitled to the benefits of the Act.

3. In holding that respondents are veterans entitled to the benefits of the Veterans' Preference Act of 1944.

4. In holding that respondents are "ex-servicemen" within the meaning of that term as used in the Veterans' Preference Act.

5. In holding that the official action of petitioners as members of the Civil Service Commission could be compelled in the circumstances of this case.

6. In affirming the judgment for respondents.

REASON FOR GRANTING THE WRIT

The Veterans' Preference Act of 1944 (Appendix, *infra,* pp. 23–24), was passed in order to assure to veterans a preferential employment status with the Federal Government upon their

return to civilian life. Its enactment had been recommended by the late President Roosevelt, who said (H. Rep. 1289, 78th Cong., 2d sess., p. 5):

> I believe that the Federal Government, functioning in its capacity as an employer, should take the lead in assuring those who are in the armed services that when they return special consideration will be given to them in their efforts to obtain employment. It is absolutely impossible to take millions of our young men out of their normal pursuits for the purpose of fighting to preserve the Nation, and then expect them to resume their normal activities without any special consideration shown them.
>
> The problems of readjustment will be difficult for all of us. They will be particularly difficult for those who have spent months and even years at the battle fronts all over the world. Surely a grateful nation will want to express its gratitude in deeds as well as in words.

The reports of the House and Senate Committees on Civil Service on the legislation [3] stressed the general reemployment and rehabilitation benefits provided by the bill for those whose normal employment and mode of life had been disrupted

[3] H. R. 4115, 78th Cong., 2d sess., which became the Veterans' Preference Act of 1944, for the first time brought together in comprehensive statutory form the various statutory provisions, Executive Orders, and regulations conferring on

by their service in the armed forces.[4] The debates in Congress, with their repeated references to "reemployment," "rehabilitation," "when the soldier returns who has been willing to fight for his country on the fighting front," "when this war is over and our boys come home," and "when they return from service" (90 Cong. Rec. 3502, 3504, 3506), reflect a clear Congressional purpose to confer employment preference only on those veterans who gave up their normal pursuits and surround-

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veterans special federal employment benefits and privileges (H. Rep. 1289, 78th Cong., 2d sess., p. 1; S. Rep. 907, 78th Cong., 2d sess., p. 1; 90 Cong. Rec. 3502, 3505). The bill was reported to the House on March 27, 1944 (90 Cong. Rec. 3156; H. Rep. No. 1289, 78th Cong., 2d sess.), and passed the House on April 17, 1944 (90 Cong. Rec. 3507). Hearings were held before the Senate Committee on May 19 and 23, 1944 (Hearings before the Committee on Civil Service (Senate) on S. 1762 and H. R. 4115, 78th Cong., 2d sess.), and the bill was reported to the Senate May 25, 1944 (90 Cong. Rec. 4959; S. Rep. No. 907, 78th Cong., 2d sess.). As amended, it passed the Senate on June 12, 1944 (90 Cong. Rec. 5785), and was approved on June 27, 1944 (90 Cong. Rec. 6712).

A companion bill, S. 1762, had been introduced in the Senate on March 9, 1944 (90 Cong. Rec. 2401).

[4] The House Report states: "Private employers and corporations, as well as State, county, and municipal governments, have been urged through the selective-service law and otherwise to afford reemployment to veterans when they leave the armed forces. Your committee feels that the Federal Government should set the pace, and that this proposal is an essential part of the reemployment and rehabilitation program." H. Rep. 1289, *supra*, p. 3.

Similarly the Senate Report states: "The committee believes that in view of the fact that members of the armed forces rapidly are being returned to civilian life, the bill should be enacted without delay." S. Rep. 907, *supra*, p. 1.

ings and freedom of movement to the demands of military service.

The legislation resulting from these deliberations is entitled, "An Act to give honorably discharged veterans, their widows, and the wives of disabled veterans, who themselves are not qualified, preference in employment where Federal funds are disbursed." Among the benefits which the Act confers on such honorably discharged veterans is the one that in "certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions" in the Government, preference shall be given to "those ex-service men and women who have served on active duty in any branch of the armed forces of the United States, during any war, * * * and have been separated therefrom under honorable conditions."

The decision below holds that individuals who were enrolled as temporary members of the Volunteer Port Security Force of the Coast Guard Reserve, who were assigned duty periods averaging less than six hours a week [8] at times selected to interfere as little as possible with their hours of regular civilian employment, whose civilian employment during their enrollment was not interrupted in any way, who could be disenrolled at their own request upon representation that their duty

[8] Respondent Cohen was enrolled for approximately 72 weeks during which time his service totalled 398 hours. Respondent Hubickey was enrolled for approximately 50 weeks during which time his services totalled 250 hours.

assignments conflicted with such civilian employment, who were not subject to transfer away from their homes without their consent, who remained subject to the draft provisions of the Selective Training and Service Act of 1940, but who had been furnished certificates stating that they had been disenrolled under honorable conditions, are preference eligibles within the meaning of the Veterans' Preference Act.

The majority of the court below held that the word "ex-servicemen," which is not a word of art and which is not defined in the Act, had a connotation sufficiently broad to embrace the present respondents. The dissenting judge, on the other hand, said that (R. 45) "It is paradoxical to suggest that Congress intended to include, and aid in the rehabilitation and re-employment of, a whole class of men whose regular employment and way of life were never interrupted." We agree with the dissent and submit, not only that the word "ex-servicemen" as used in the Act did not embrace persons whose services were of the limited character rendered by the present respondents, but also that the ruling below produces "an unreasonable result, 'plainly at variance with the policy of the legislation as a whole.'" *United States* v. *Rosenblum Truck Lines*, 315 U. S. 50, 55.

1. "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according

to the circumstances and the time in which it is used." *Towne* v. *Eisner*, 245 U. S. 418, 425, *per* Holmes, J. An expression in a statute may have a different meaning from precisely the same expression in a constitutional provision (*Gully* v. *First Nat. Bank*, 299 U. S. 109, 113–114; *cf.* Holmes, J., dissenting, in *Eisner* v. *Macomber*, 252 U. S. 189, 219–220). A particular word in a statute frequently means something else in another statute (*Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 257–259) or even in another part of the same statute (*Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433–434; *Helvering* v. *Stockholms &c. Bank*, 293 U. S. 84, 86–88). In the field of military and naval legislation, the word "officer" has been held by this Court not to cover a paymaster's clerk in the Navy in one context (*United States* v. *Mouat*, 124 U. S. 303), but, in the decision immediately following, in the same volume of reports, a paymaster's clerk in the Navy was held to be an "officer" in another context (*United States* v. *Hendee*, 124 U. S. 309). The same approach is called for here, where certainly "ex-serviceman" is less a word of art than "officer". And, as we have already pointed out above, pp. 10–12, the legislative history of the Veterans' Preference Act clearly shows that, so far as veterans of World War II were concerned,[6]

[6] Congress intended to preserve and expand the preference rights theretofore conferred upon veterans of prior wars, and also, by virtue of Section 18, to preserve the preference theretofore conferred upon veterans of peacetime service.

Congress intended to confer preference in governmental employment only upon those veterans who had been forced to relinquish their civilian employment because of full-time active duty with the armed forces. Certainly nothing in either the committee reports or in the debates lends the slightest support to the holding of the majority below, which confers a preference on persons who continued their normal civilian employment during the war, who in consequence retained their relative positions in the community and the financial advantages incident thereto, and who, in short, were not uprooted from their homes and from their wonted mode of life. If resort to legislative history is ever justified to give value and meaning to legislative language, then here, clearly, there is no warrant for the decision below.[1]

2. Even as a mere matter of language, the decision below is obviously unsound. As Mr. Justice Edgerton said in his dissent (R. 44):

> The Commission's understanding of the term "ex-servicemen" is in accordance with ordinary usage. The court's construction conflicts with ordinary usage. When one

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[1] Proceedings in Congress since the pendency of the present litigation are inconclusive. A number of bills introduced in the 79th Congress would have conferred upon temporary members of the Coast Guard Reserve the benefits here obtained by these respondents, together with some additional benefits. S. 1613, 79th Cong., 1st sess., H. R. 3814 and 3815, 79th Cong., 1st sess. A bill now pending would reach just the opposite result. H. R. 1389, 80th Cong., 1st sess.; see H. Rep. 465, 80th Cong., 1st sess.

> speaks of ex-servicemen one is not speaking of men who always remained subject to draft; who lived at home and could not, except through the machinery of the draft, be ordered to leave home; who constantly carried on their regular civilian occupations as usual; and whose connection with the armed forces involved only part-time unpaid work which entitled them only to civilian benefits in case they were injured.

In ordinary usage, the words "ex-serviceman" or "veteran,"[8] as those terms are commonly used with reference to a person who has served in the armed services of the United States, connote one who enlisted, volunteered, was mustered, or was inducted, into the armed services of the United States; while serving in wartime was on full-time active military duty; was entitled to receive statutory military pay and allowances; from the time of his entry into the armed services until his separation therefrom was at all times subject to military orders and discipline; and, during his period of service, did not form a part of the civilian community. It is in this accepted sense that the Congress makes provision for the granting of gratuities and other benefits to veterans. See, *e. g.*, World War Veterans Adjusted Compensation Act, c. 157, 43 Stat. 121, 122 (38 U. S. C. 602); Section 8 of the Selective Training and Service

[8] The word "ex-serviceman" is employed in the Act as synonymous with the word "veteran." (E. g., the title to the Act; Section 4; Section 8.)

Act, c. 720, 54 Stat. 890 (50 U. S. C. App. 308); Title II, § 400, of the Servicemen's Readjustment Act of 1944, c. 268, 58 Stat. 284, 287 (38 U. S. C., Supp. V, 701); Sections 1 and 6 of the Act of December 14, 1944, c. 581, 58 Stat. 803 (38 U. S. C., Supp. V, 503, 735). In describing the beneficiaries of veterans' legislation, the Congress ordinarily employs a formula in which the beneficiary is defined as a "person" who served in the armed services and is entitled to the benefits provided, if he has served "ninety days or more," or "at least ninety days." Sections 1 and 6 of the Act of December 14, 1944, *supra;* Section 1 of the Act of September 27, 1944, c. 421, 58 Stat. 747 (43 U. S. C., Supp. V, 279); Servicemen's Readjustment Act of 1944, *supra.* In the Veterans' Preference Act, the usual formula was omitted and the word "ex-servicemen" substituted in place thereof. The use of the word "ex-servicemen" in the Act must, as was pointed out below by Edgerton, J., in his dissent, mean something more than "person." It was intended, we submit, to designate the beneficiary as being more than a person who served intermittently in the armed services. Certainly it was not intended to include persons whose military activities were as circumscribed as were those of the respondents.

3. In an effort to refute our contention that the Act envisages full-time service only, the court below argued that in the same paragraph of the Act Congress gave identical preference eligibility to the unmarried widows of deceased servicemen,

which widows, generally speaking, "continued normal civilian employment during the war" (R. 42); and that, in any event, the saving clause of the Act, which became effective June 27, 1944, precluded the Civil Service Commission on November 4, 1944, from revoking its instructions of April 4, 1944, and ruling that only former temporary reservists who had been on full-time active duty and pay were entitled to the benefits of the Act (R. 43). These distinctions, we submit, lack substance.

a. In so far as the "unmarried widow" of a deceased veteran is concerned, her right to preference is a derivative one, stemming from the service which her deceased husband performed. She is preferred, not because *she* was removed from civil life, but because her deceased husband was. It is a far, and, we submit, an insurmountable step, to argue that since the widow of the veteran who went to war gets a preference even when she herself did not do so, therefore respondents who stayed at home are likewise entitled to a preference; for if respondents may be preferred, then *their* widows must likewise be. Such an attenuation of the required degree of service would pervert the statute.

Moreover, as we have pointed out above, the Act was intended to bring together in statutory form the previous statutes, Executive orders, and regulations issued pursuant thereto which had accorded to veterans federal employment prefer-

ence. S. Rep. 907, *supra*, p. 1; H. Rep. 1289, *supra*, p. 1; 90 Cong. Rec. 3502, 3505. Thus the provision for the unmarried widows of veterans was merely an incorporation in the present Act of the provisions of prior acts. R. S. § 1754; Act of July 11, 1919, c. 6, 41 Stat. 35, 37; Act of June 18, 1929, c. 28, 46 Stat. 21 (5 U. S. C. 35).[9]

b. The Civil Service Commission's ruling of April 4, 1944, that all temporary members of the Coast Guard Reserves were entitled to veterans' preference, which was subsequently overruled by the Civil Service Commission on November 4, 1944, confers no vested rights on respondents.[10] While Section 18 of the Veterans' Preference Act, Appendix, *infra*, p. 24, provides that the Act shall not be construed as taking away from any preference eligible any rights heretofore granted or possessed by him, under any existing Civil Service rule or regulation, the ruling of the Civil Service Commission of November 4, 1944, withdrawing its earlier

[9] During the discussion of the bill in the House of Representatives on April 17, 1944, Mr. Rees stated: * * * the bill * * * continues the law and Executive orders that have been in effect for a number of years providing for veterans' preference in governmental employment (90 Cong. Rec. 3503).

[10] While both respondents were enrolled subsequent to the ruling of April 4, 1944, and prior to its revocation on November 4, 1944, it cannot be urged that a subsequent right to preference was a part of their contract of enrollment. While it conceivably may have constituted a matter of inducement, it certainly was no part of the consideration for entering into the enrollment.

ruling of April 4, 1944, was not based upon, and did not result from, any provisions of the Act. It was merely issued to correct a prior ruling, erroneous when made. No rights were conferred on respondents by the issuance of this invalid instruction (*Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 134), and there is no basis for asserting that such rights may be secured by way of estoppel. *United States* v. *San Francisco*, 310 U. S. 16; *John M. Parker Co.* v. *Commissioner of Internal Revenue*, 49 F. 2d 254 (C. C. A. 5); *Sternfeld* v. *United States*, 32 F. 2d 789 (N. D. N. Y.). On the contrary, it is clear from the legislative history that this "saving clause," Section 18 of the Act, was only intended to preserve the preference rights of former "peacetime" veterans then in government employment,[11] and was not designed

[11] House Report No. 1289, *supra*, issued on March 27, 1944, states that the Act "* * * eliminates from future preference so-called peacetime veterans, but in section 18 there is specific provision that the act is not to be construed as taking away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof" (p. 3).

Senate Report No. 907, *supra*, issued May 25, 1944, states: "Ex-servicemen whose only service was performed during peacetime would not in the future be entitled to preference. By virtue of the provisions of section 18, however, peacetime veterans who are already in Government employment, or whose names are carried on civil-service registers on the date of enactment of this bill, will not lose the preference accorded them under existing laws and regulations" (p. 2).

drastically to widen the coverage of the Act because of a single erroneous ruling.

4. We have been informally advised by the Coast Guard that, from beginning to end, a total of some 125,000 individuals were enrolled as temporary reservists in the Volunteer Port Security Force. If the decision below is permitted to stand, all of these persons—and their widows—would be entitled to classification as preference eligibles. Such a result would be manifestly unfair, not only to the thousands of men and women now in Government service who performed full-time active duty in the armed services, but also to the competitive position of other thousands of Federal workers who also voluntarily performed essential defense work during the last war but who have been given no preference. For the preference involved assumes vital significance as budgetary considerations necessitate reductions in force. We submit that the decision below is so far-reaching as imperatively to require review by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

JUNE 1947.

APPENDIX

1. The pertinent portions of the Veterans' Preference Act, Act of June 27, 1944, c. 287, Secs. 2, 18, 58 Stat. 387, 391 (5 U. S. C., Supp. V, 851, 867), provide:

> Sec. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the War Department or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on active

duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions.

Sec. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

2. The pertinent portions of the Coast Guard Auxiliary and Reserve Act, Act of February 19, 1941, c. 8, Title II, §§ 207, 208, 55 Stat. 12, as amended (14 U. S. C. 307, 308), provide:

Sec. 207. The Commandant, with the approval of the Secretary of the Treasury or of the Secretary of the Navy, while the Coast Guard is operating as a part of the Navy, is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe, including but not limited to part-time and intermittent active duty with or without pay, and without regard to age, members of the Auxiliary, such officers and members of the crew of any motorboat or yacht placed at the disposal of the Coast Guard, and such persons (including Government

employees without pay other than compensation of their civilian positions) who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty, as are citizens of the United States or of its Territories or possessions, including the Philippine Islands, to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowances of their respective ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve.

Sec. 208. Members of the Reserve, other than temporary members as provided for in section 207 hereof, shall receive the same exemption from registration and liability for training and service as members of the Naval Reserve, and no member of the Reserve, other than temporary members thereof, shall be a member of any other naval or military organization except the Auxiliary or the Coast Guard as provided for in section 214 and 215 of this title: *Provided,* That temporary members of the Reserve who may be members of any other military reserve, if ordered to active duty therein, shall be forthwith released from all active duty with the Coast Guard, and their status as temporary members of the Reserve terminated.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 130

HARRY B. MITCHELL, FRANCES PERKINS, ARTHUR S. FLEMMING, INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, PETITIONERS

v.

JACK W. COHEN

No. 131

HARRY B. MITCHELL, FRANCES PERKINS, ARTHUR S. FLEMMING, INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, PETITIONERS

v.

HARRY W. HUBICKEY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The oral opinion of the District Court of the United States for the District of Columbia (R. 44–45, 59–60) is reported at 69 F. Supp. 54. The

majority and dissenting opinions in the United States Court of Appeals for the District of Columbia (R. 62–71) are reported at 160 F. 2d 915.

JURISDICTION

The judgment of the Court of Appeals covering both cases was entered on March 24, 1947 (R. 71–72). The petition for writs of certiorari was filed on June 13, 1947, and was granted on October 13, 1947. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether members of the Volunteer Port Security Force, a branch of the Temporary Coast Guard Reserve, who were assigned duty periods (here, of less than six hours a week) in order to interfere as little as possible with their hours of regular civilian employment during their enrollment, who could be disenrolled at their own request upon representation that their duty assignments conflicted with such civilian employment, who were not subject while on duty to transfer away from their homes without their consent, and who remained at all times subject to the draft provisions of the Selective Training and Service Act, 1940, are entitled to preference in federal employment as "ex-servicemen * * * who have served on active duty in any branch of the armed forces of the United States, during

any war," within the meaning of the Veterans' Preference Act of 1944.

STATUTES INVOLVED

The Veterans' Preference Act of 1944, 58 Stat. 387, and pertinent portions of the Coast Guard Auxiliary and Reserve Act, 55 Stat. 12, as amended, are set forth in the Appendix, pp. 58–71.

STATEMENT

The essential facts in these cases, which are substantially identical and are not in dispute, are as follows:

Respondent Cohen was enrolled as a temporary member of the United States Coast Guard Reserve on April 13, 1944, to serve as a member of the Volunteer Port Security Force and was assigned to duty with the Captain of the Port, Washington, D. C. (R. 1–2, 9, 10, 15). He served only on part-time duty without compensation and without interruption of his civilian employment with the Government (R. 2). He was disenrolled as a temporary member of the Reserve on September 5, 1945, having served on active duty fifty-eight days, for a total service of 398 hours (R. 2, 9, 15). Respondent Hubickey was enrolled as a temporary member of the United States Coast Guard Reserve on October 18, 1944, to serve as a member of the Volunteer Port Security Force, and was assigned to duty with the Captain of the Port, Philadelphia, Pennsylvania.

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He served only on part-time duty without compensation, and without interruption of his civilian employment with the Government (R. 46–47, 54, 56). He was disenrolled as a temporary member of the Reserve on September 30, 1945, having served on active duty thirty-two days, for a total service of 250 hours (R. 54).

Pursuant to the authority set forth in Section 207 of the Coast Guard Reserve Act, Act of February 19, 1941, c. 8, 55 Stat. 12, as amended,[1] the Commandant, United States Coast Guard, undertook to enroll as temporary members of the

[1] Section 207 provides:

"The Commandant, with the approval of the Secretary of the Treasury or of the Secretary of the Navy, while the Coast Guard is operating as a part of the Navy, is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe, including but not limited to part-time and intermittent active duty with or without pay, and without regard to age, members of the Auxiliary, such officers and members of the crew of any motorboat or yacht placed at the disposal of the Coast Guard, and such persons (including Government employees without pay other than compensation of their civilian positions) who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty, as are citizens of the United States or of its Territories or possessions, including the Philippine Islands, to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowances of their respective ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve."

Coast Guard Reserve approximately 70,000 persons for such duty as was prescribed in the various contracts of enrollment (R. 13). The duties of these members ranged from full-time active duty, with military pay and allowances, to part-time or intermittent duty without pay and allowances other than for uniforms (R. 13–15).[2] Under the

[2] Members of the Coast Guard Reserve (Temporary) were enrolled according to the following classifications (R. 13–15, 22):

(1) For full-time duty with military pay and allowances. Little, if any, distinction was made between this group and regular members of the Reserve of similar rank or ratings, with the exception that the former was generally limited to the performance of duty at shore stations within the continental limits of the United States and aboard vessels operating from continental shore bases. We do not contest the right of members of this branch of the Reserve to the benefits of the Veterans' Preference Act.

(2) For part-time or intermittent duty without pay and allowances other than for uniforms. The service of these personnel was purely voluntary and their only compensation was a uniform allowance if they consistently served 12 hours per week. This was known as the Volunteer Port Security Force, of which respondents were members. There were some 70,000 men enrolled in the temporary reserve at one time. Of this number, the largest single group comprised the Volunteer Port Security Force, although there is no record of its exact number.

(3) For pilots without pay and allowances other than for uniforms but paid by their own companies. Pilots throughout the country were enrolled and put in uniforms in officer rank as a matter of military convenience. This made it possible to exercise a certain amount of military control over these men in time of war, and to clothe them in some military authority.

(4) For officers of Great Lakes vessels without pay and allowance other than for uniforms but paid by their own

terms of enrollment to which respondents and other members of the Voluntary Port Security Force subscribed, they continued their regular civilian employment and could not be transferred from the place they lived without their consent (R. 6, 15, 51). It was the practice of the Coast Guard to assign duty periods for the convenience of the members of the Volunteer Port Security Force so as to interfere as little as possible with the hours of their regular civilian employment, and many members of the Volunteer Port Security Force were disenrolled at their own request upon representations that their duty assignments conflicted with their civilian employment (R. 15). These members were obligated to be on active duty "only as directed by competent authority for a minimum of 12 hours per week" (R. 6, 51). They received no pay for such duty; however, they did, in most cases, receive a uniform allow-

companies. These personnel were enrolled as temporary officers in the Coast Guard Reserve in an effort to prevent sabotage on Great Lakes vessels.

(5) For Coast Guard police without pay and allowance. These personnel were enrolled to afford protection to war plants. The program was abandoned by the Navy in February 1944, upon the advice of Congress.

(6) For Civil Service employees of the Coast Guard enrolled for full-time active duty without pay other than compensation of their civilian positions. Civilian key employees of the Coast Guard were enrolled as temporary members of the reserve as a matter of administrative convenience. They continued to perform the same duties, retain their civil service status, and receive civil service pay.

ance, and, in some instances food or subsistence allowance while on active duty (R. 7, 14, 15, 52). Enrollees in the Volunteer Port Security Force ordinarily served on patrol of waterfronts, as sentries, and in the guarding and protection of harbors, ports, and shipping (R. 14).

Members of the Volunteer Port Security Force were not exempted from the Selective Training and Service Act of 1940, as amended, and many were in fact drafted or did enlist in the regular or regular reserve components of the armed forces, thereby necessitating their disenrollment as temporary members of the Coast Guard Reserve (R. 7, 15, 52). They were accorded the same hospital treatment as members of the Regular Coast Guard Reserve for illness or disease contracted while on duty. However, in case of physical injury or death incurred in line of duty, they were entitled only to the benefits granted to federal civilian employees by the United States Employees Compensation Commission (R. 7, 40, 52). Members of this group were not accorded the benefits of National Service Life Insurance (R. 32, 33, 40, 42). The certificates of enrollment for members of the Volunteer Port Security Force provided that their military status should attach only during periods when they were actually engaged on active duty or en route to and from such duty (R. 6–7, 51–52). While on active duty they wore the uniform and were vested with

the same authority as members of the regular Coast Guard of similar rank, grade, or rating, and were subject to the laws, regulations, and orders of the Coast Guard and to its disciplinary action (R. 6–7, 51–52). Upon severance they did not receive an honorable discharge, but were issued a "Certificate of Disenrollment" (R. 9, 54); they did not receive mustering-out pay (R. 21–24).

On April 4, 1944, before the passage of the Veterans' Preference Act, the Civil Service Commission issued Circular Letter No. 4145 to Regional Directors and Division Chiefs of the Commission, which provided that active duty performed by temporary members of the Coast Guard Reserve, whether full time, part time, or intermittently, either with or without pay, including Government employees enrolled without pay other than the compensation of their civilian positions, constituted active duty as distinguished from training duty and entitled the member performing such duty to preference benefits under the then existing preference laws (R. 3–4, 18–19, 48–49). However, a week later, on April 11, 1944, the Secretary of the Navy determined that only those temporary Coast Guard Reservists who were performing full-time active duty at full pay and allowances at shore stations or on Coast Guard vessels were entitled to the benefits of the Mustering-Out Payment Act of February 3, 1944, c. 9, 58 Stat. 8 (38 U. S. C., Supp. V, 691a) (R. 20–

24).[3] Subsequently, on November 4, 1944 (after the enactment of the Veterans' Preference Act), and pursuant to a recommendation of the Acting Secretary of the Navy, the Civil Service Commission modified its earlier ruling of April 4, 1944, and provided that only those temporary Coast Guard Reservists performing full-time duty with pay and allowances at shore stations or aboard Coast Guard vessels were entitled to veterans' preference under the terms of the Veterans' Preference Act of 1944, Appendix, *infra*, pp. 58–67. (R. 4–5, 16–20, 49–50).

In accordance with this ruling of November 4, 1944, respondents were denied veterans' preference by the Civil Service Commission (R. 2, 9, 10, 47, 54, 56). Thereafter, due to general reductions in force, respondent Cohen was discharged from his position as a civilian economist, War Department (R. 2, 10, 12), while respondent Hubickey was notified that he would be discharged from his position as a civilian naval architect, Navy Department (R. 47, 55–56). Respondents instituted these actions, praying that petitioners be ordered to classify them as preference eligibles, and that the court adjudge and declare them entitled to the

[3] The Judge Advocate General of the Navy pointed out that allowance of mustering-out pay to temporary Coast Guard reservists would run counter to one of the major purposes of the Mustering-Out Payment Act, namely, to help servicemen and women tide over the difficult period of readjustment from military to civilian life (R. 23).

status of preference eligibles under the provisions of the Veterans' Preference Act of 1944, Appendix, *infra*, pp. 58–67 (R. 1–5, 46–50). Both petitioners and respondents moved for summary judgment (R. 11, 13, 57, 58) and the District Court granted judgments for respondents (R. 43–44, 58–59). On appeal, the court below affirmed (R. 62–72), Mr. Justice Edgerton dissenting.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that temporary members of the Volunteer Port Security Force of the Coast Guard Reserve are entitled to preference in federal employment.

2. In failing to give effect to the plain intent of Congress, as disclosed by the legislative history of the Act, as to the type of ex-serviceman intended to be entitled to the benefits of the Act.

3. In holding that respondents are veterans entitled to the benefits of the Veterans' Preference Act of 1944.

4. In holding that respondents are "ex-servicemen" within the meaning of that term as used in the Veterans' Preference Act.

5. In holding that the official action of petitioners as members of the Civil Service Commission could be compelled in the circumstances of this case.

6. In affirming the judgment for respondents.

SUMMARY OF ARGUMENT

I. Temporary Coast Guard reservists are not entitled to veterans' preference under Section 2 of the Veterans' Preference Act of 1944, which establishes preference for "those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war * * * and have been separated therefrom under honorable conditions." This statutory provision, like most other statutes in the field of military and veterans' legislation, can properly be read only in the light of its policy, purpose, context, and history. In the first place, the words of the Act, read literally and by themselves, give rise to serious questions: "active duty" might well mean active *full-time* duty; "ex-serviceman" and "veteran," its statutory synonym, have a widespread common connotation at variance with respondents' hybrid part-time status; and other provisions of the Act cannot well be applied to ex-(temporary) reservists. Thus, the true meaning of Section 2's terms cannot be ascertained from the words alone, but only by reference to the Act's background and purpose. But even if the statutory words be thought to be plain on their surface, the result which respondents urge—their attainment of veterans' status—is so far at variance with the policy of the legislation as a whole that the statute's "apparent absolutes" must give way

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to a more reasonable and just reading, as this Court has consistently held from *United States* v. *Kirby*, 7 Wall. 482, to *Markham* v. *Cabell*, 326 U. S. 404.

The purpose of the Veterans' Preference Act, the circumstances of its enactment, and its related legislation, all indicate that preference is not to be accorded to men who retained their civilian employment during the war, and served as intermittently, and on as restricted a basis, as respondents. It is clear from the legislative history that the major purpose of the Act, so far as World War II veterans were concerned, was to aid in the reemployment and rehabilitation of these veterans on their return to civilian life by giving them a definite priority in the Federal service. This purpose would be hindered, rather than furthered, by conferring preference on persons who continued their normal civilian employment during the war, who remained part of the civilian community, who served intermittently and for short weekly periods, whose Coast Guard assignments were selected so as to interfere as little as possible with their regular civilian employment, who could not be transferred without their consent, and who could be disenrolled at their own request if their duty assignments conflicted with their civilian work. Granting preference to these individuals would gravely dilute the rights of real veterans, and of the thousands of civilian government workers whose

job status during the war was the same as that of respondents.

This Congressional purpose to protect full-time veterans is reflected in the terms of the Act which speak of "ex-servicemen" and "veterans," and contain general provisions obviously applicable only to those who served full-time. Proceedings in the 80th Congress on legislation to amend the Act, arising out of this litigation, indicate a widespread view both that temporary Coast Guard reservists should not receive preference and also that the lower courts have misconstrued the purpose and intent of the 78th Congress, which adopted the Preference Act. This bill, excluding the reservists by defining "active duty" as "full-time duty," has passed the House of Representatives, and been favorably reported to the Senate by its Committee on Civil Service.

Significant light on the meaning and intent of the Preference Act is also cast by the Servicemen's Readjustment Act of 1944 (the "G. I. Bill of Rights"), a contemporaneous enactment, and by other related federal military and veterans' legislation. The Readjustment Act accords its benefits to "any person who shall have served in the active military or naval service," and been honorably separated "after active service of ninety days or more." If the similar words of the Preference Act entitle respondents to veterans' preference, temporary reservists who put in ninety days of service—of whom there seem

to be a substantial number—would be eligible for the benefits of the G. I. Bill of Rights. But it is hardly conceivable that Congress intended these rights, designed to help returning veterans reintegrate themselves in civilian life, to be available to temporary reservists who had never been removed from civilian life; and the Veterans' Administration has so ruled. The Preference Act, so similar in purpose and wording, and enacted at the same time, is plainly *in pari materia,* in the strictest sense, and should be read in the same way. Coast Guard temporary reservists have also been administratively held ineligible for related privileges, such as National Service Life Insurance, veterans' pensions, medical and hospital benefits, and mustering-out pay. The purpose, language, and administrative construction of this "general system" of statutes are persuasive against respondents' claim for rights under the Preference Act, which forms one part of that system.

That soldiers who served at headquarters in Washington and unmarried widows of veterans likewise fall under the Act's protection hardly proves, as the Court of Appeals thought, that respondents must prevail. The former differed radically from temporary reservists in being subject at all times to military discipline, and to immediate transfer, frequently into actual combat, without their consent. Preference for veterans' widows was merely a continuation of the

requirements of previous legislation, and constitutes a derivative right stemming from the services performed by the deceased veteran-husband when he was removed from civilian life.

II. Nor did respondents acquire veterans' preference under Section 18 of the Act (approved June 27, 1944)—preserving for "any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation"—by virtue of the Civil Service Commission's ruling of April 4, 1944, that temporary reservists were entitled to preference under the then existing law. This ruling was revoked on November 4, 1944. Respondents joined the reserve on April 13, 1944, and October 18, 1944, and were not disenrolled until September 5, 1945, and September 30, 1945, respectively. On June 27, 1944, when the Preference Act became law, neither was an "ex-serviceman," a "veteran" or a "preference eligible," in any sense of those words, and therefore not possibly in possession of any rights under the pre-existing law. The most that can be said of the April 4 ruling is that it informed respondents that if they thereafter served in the temporary Reserve, and the ruling continued unrevoked by the Commission and unchanged by Congress, they would receive preference upon their disenrollment. But they had no "vested" rights on June 27, the date of the Preference Act, and Section 18 was designed only to save

such "vested" rights, particularly of peacetime veterans who were entitled to preference under prior law but not under the new Act. Section 18 was not intended to preserve prior laws, rulings, and orders *in toto*, but only to the extent that rights under them had already been actually earned. Moreover, there is grave doubt whether the April 4 ruling was correct under the prior law, which gave preference only to "honorably discharged soldiers, sailors, and marines." Respondents obviously could gain no rights under such an unauthorized ruling.

ARGUMENT

I

TEMPORARY COAST GUARD RESERVISTS ARE NOT ENTITLED TO VETERANS' PREFERENCE UNDER SECTION 2 OF THE VETERANS' PREFERENCE ACT OF 1944

The Veterans' Preference Act of June 27, 1944 establishes preference in all government positions for "those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions." Section 2, *infra*, pp. 58–59.[4] In seeking this vet-

[4] The Act also grants preference to (a) veterans with service-connected disabilities or receiving pensions or retirement benefits; (b) wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for appointment; and (c) unmarried widows of deceased veterans. *Infra*, pp. 27–28, 45–46.

erans' preference for Coast Guard Temporary Reservists, respondents stand solely upon the statutory words, the "plain meaning" of which, without more, they assert as sufficient basis for their claim. We doubt, however, whether this Act, any more than the host of other legislation which reaches this Court for application, can properly be read without regard to the light cast upon it by the Congressional purpose in enacting it, or by its context and place in legislative history. Nor can we agree that the decisive language of the Act is so clear and plain to all who read that no room is left for choice informed by "the context, the purposes of the law, and the circumstances under which the words were employed." *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 258. Any proper reading of the Act, in our view, must deny the status of preferred veterans in the Federal service to men who served so intermittently in the armed services as these temporary reservists, whose military activities were so limited and circumscribed, who always remained an integral part of their civilian communities, and who could not, unlike others in the military service, be summarily removed from their homes without their consent.

A. SECTION 2 OF THE ACT CAN PROPERLY BE READ ONLY IN THE LIGHT OF ITS POLICY, PURPOSE, AND HISTORY

1. The field of military and veterans' legislation is preeminently one in which a searcher for meaning cannot stop after simply parsing the

printed page. The example of numerous decisions warns of the unlikelihood that a "plain" or "inescapable" reading will be found to settle a serious controversy. This Court, for instance, has held the word "officer" to exclude a paymaster's clerk in the Navy in one context (*United States* v. *Mouat,* 124 U. S. 303), but, in the decision immediately following, decided on the same day, a naval paymaster's clerk was held to be an "officer" for the purposes of another statute (*United States* v. *Hendee,* 124 U. S. 309). A "soldier" has been held also to be a "sailor" (19 Op. Atty. Gen. 586), and to include a member of the Women's Army Corps (*United States* v. *Williams,* 59 F. Supp. 300, 301 (W. D. N. Y.)), but not to comprehend an army field clerk serving in France (*Stephens* v. *Civil Service Comm.,* 101 N. J. L. 192). One discharged from the draft in 1918 before being accepted by the Army has been held an "honorably discharged *soldier*" by the Court of Appeals for the District of Columbia (*Hurley* v. *Crowley,* 50 F. 2d 1010), but refused that designation by the Supreme Court of Iowa (*Lamb* v. *Kroeger,* 233 Iowa 730; cf. *Patterson* v. *Lamb,* 329 U. S. 539); and the Supreme Judicial Court of Massachusetts holds him not to be a "veteran." *Dunn* v. *Commissioner of Civil Service,* 281 Mass. 376; cf. 40 Op. Atty. Gen. No. 103, October 16, 1945. Service in the Marine Corps has been recognized as service in the "Army or

Navy" (*United States* v. *Dunn*, 120 U. S. 249), and the terms "military forces" or "military establishment" frequently include the Navy or Marine Corps. *United States* v. *Sweeny*, 157 U. S. 281, 284; 31 Op. Atty. Gen. 445, 452; *In the Matter of Stewart*, 30 N. Y. Super. (7 Rob.) 635; *Maclean* v. *Brodigan*, 41 Nev. 468; *In re the Right of Electors*, 41 R. I. 118. In all these instances, it was plainly futile for courts or parties to rest on bare words, or to exclude the usual aids to meaning, and the statutory language was properly treated as open to interpretation.

2. Section 2 of the Veterans' Preference Act, using similar terms, and in the same general area of legislation, likewise presents a problem for construction. Even respondents' analytical word-by-word reading reveals room for questioning and for choice. For one thing, the statute requires service "on active duty"; on the basis of their Certificates of Disenrollment which refer to the intermittent activities they carried on as the performance of "active duty" (R. 9, 54), respondents assume that they automatically satisfy this requirement. But Congress' understanding of the words "active duty" in the Preference Act may well have been limited to *full-time duty*, even though for other purposes, in other legislation (such as the Coast Guard Auxiliary and Reserve Act), "intermittent active duty" was contemplated; indeed, an explicit definition of

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"active duty" as "active full-time duty with military pay and allowances" is the method used by the bill now under consideration by the 80th Congress to clarify the exclusion of temporary reservists from veterans' preference.[5] Again, the term "ex-servicemen," which is certainly less a word of art than "officer" or "soldier," has no precise technical definition ready for mechanical application, without regard to the purpose or background of the statute in which it appears. The Act also makes the word "ex-serviceman" synonymous with "veteran,"[6] a term with a

[5] H. R. 1389, 80th Congress, adopted by the House of Representatives on June 19, 1947 (93 Cong. Rec. 7464–7, daily ed.), and favorably reported by the Senate Committee on Civil Service (S. Rep. No. 396), would amend Section 2 to provide that "when used in this section the term 'active duty in any branch of the armed forces of the United States' shall mean active full-time duty with military pay and allowances in any branch of the armed forces during any war or in any campaign or expedition (for which a campaign badge has been authorized)." See, *infra*, pp. 34–35.

The Veterans' Administration likewise views temporary reservists as not within "what is ordinarily referred to as the 'active military or naval service.'" Administrator's Decision, Veterans' Administration, No. 699, May 20, 1946 (R. 29).

[6] The Act is entitled one "To give honorably discharged *veterans*, their widows, and the wives of disabled *veterans*, who themselves are not qualified, preference in employment where Federal funds are disbursed." 58 Stat. 387. [Italics supplied.] Its statutory name is "Veterans' Preference Act of 1944" (58 Stat. 387). The term "veteran" is also used interchangeably with "ex-servicemen" within the Act; Section 4, providing that experience credit be granted to those qualifying for preference under Section 2, twice refers to them as

widespread common connotation at variance with respondents' status. And, as we shall later show (*infra*, pp. 32–34), the Act itself contains other substantive provisions which it would be difficult rationally to apply to respondents if they were to be treated as preference eligibles. Here, we need not prove that, on the basis of the words of the statute alone, temporary reservists are not entitled to preference; it suffices to point out that respondents gravely err in urging that the Act is so clear and precise on its face that the Court's reading is compelled by the few lines of Section 2 which are directly pertinent. This is not the case, for instance, of a veteran of the Canadian Army who claims preference under a statute limiting that right to those who "served in the army, navy or hospital service *of the United States*" in World War I (*State ex rel. King* v. *Emmons*, 47 Ohio App. 348, 353) [italics supplied], or of the new resident of New Jersey who, in 1939, seeks special preference under legislation expressly restricted to those who received combat military decorations "while a resident of this State." *Chapman* v. *Edwards*, 124 N. J. L. 192, 196. Those legislative words were so definite and precise that no room was left for considerations extraneous to the bare language; here,

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"veterans." 58 Stat. 388; Section 5, regarding waiver of physical requirements, refers to "any veteran" (58 Stat. 388), and Section 8 speaks of a "veteran eligible" and of a "non-veteran."

the words themselves, individually and as a unit, give rise to serious questions.

3. Even if the face of Section 2 were plainer than we believe it to be, nevertheless, in our view, the Court should look to the purpose of the Veterans' Preference Act, its place in the scheme of veterans' legislation, and the effect of awarding veterans' status to respondents. For, as we shall show in detail, the rulings below produce "an unreasonable result 'plainly at variance with the policy of the legislation as a whole,'" and in such a case the Court "may follow the purpose of the statute rather than the literal words." *United States* v. *Rosenblum Truck Lines,* 315 U. S. 50, 55; *United States* v. *American Trucking Ass'ns.,* 310 U. S. 534, 543. "The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness *or to qualify its apparent absolutes* as *Holy Trinity Church* v. *United States,* 143 U. S. 457, illustrates." *Markham* v. *Cabell,* 326 U. S. 404, 409. [Italics supplied.] "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." *United States* v.

Kirby, 7 Wall. 482, 486–7.[7] And in the search for the purpose and reason of the law, it is now settled that nothing relevant is out of bounds, no matter how "'clear the words may appear on 'superficial examination.'" *United States* v. *American Trucking Ass'ns.,* 310 U. S. 534, 543–544; *United States* v. *Dickerson,* 310 U. S. 554, 562.

B. THE PURPOSE OF THE ACT, THE CIRCUMSTANCES OF ITS ENACTMENT, AND RELATED LEGISLATION, ALL INDICATE THAT VETERANS' PREFERENCE IS NOT TO BE ACCORDED TO THOSE WHO RETAINED CIVILIAN EMPLOYMENT DURING THE WAR, AND SERVED AS INTERMITTENTLY AS RESPONDENTS

1. *Purpose of the Veterans' Preference Act.*—a. The major purpose of the Veterans' Preference Act of 1944 was to assure to World War II veterans a preferential employment status with the Federal Government upon their return to civilian

[7] Mr. Justice Field goes on to say (7 Wall. at 487): "The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, "that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the Statute of 1 Edward II, which enacts that a prisoner who breaks prison shall be guilty of a felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.' And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder."

life.[8] Its enactment had been recommended by President Roosevelt, who said (H. Rep. 1289, 78th Cong., 2d Sess., p. 5):

> I believe that the Federal Government, functioning in its capacity as an employer, should take the lead in assuring those who are in the armed services that when they return special consideration will be given to them in their efforts to obtain employment. It is absolutely impossible to take millions of our young men out of their normal pursuits for the purpose of fighting to preserve the Nation, and then expect them to resume their normal activities without any special consideration shown them.
>
> The problems of readjustment will be difficult for all of us. They will be particu-

[8] H. R. 4115 was introduced on February 3, 1944 (90 Cong. Rec. 1233), and was referred to the Committee on Civil Service. The bill was favorably reported to the House on March 27, 1944 (90 Cong. Rec. 3156; H. Rep. No. 1289, 78th Cong., 2d sess.), and passed the House on April 17, 1944, after a short discussion. 90 Cong. Rec. 3501–3507. A companion bill, S. 1762, was introduced into the Senate on March 9, 1944 (90 Cong. Rec. 2401), and hearings were held on both bills by the Senate Committee on Civil Service on May 19 and 23, 1944. Hearings before the Committee on Civil Service, U. S. Senate, on S. 1762 and H. R. 4115, 78th Cong., 2d sess. The bill was reported favorably to the Senate on May 25, 1944 (90 Cong. Rec. 4959; S. Rep. No. 907, 78th Cong., 2d sess.), and passed the Senate, as amended, without debate, on June 12, 1944. 90 Cong. Rec. 5785. The House concurred in the Senate amendments, without debate, on June 20, 1944. 90 Cong. Rec. 6283. The bill was approved on June 27, 1944. 90 Cong. Rec. 6712.

> larly difficult for those who have spent months and even years at the battle fronts all over the world. Surely a grateful nation will want to express its gratitude in deeds as well as in words.

The bill was endorsed by the three major veterans' organizations (The American Legion, Veterans of Foreign Wars, Disabled American Veterans). (H. Rep. No. 1289, p. 7; 90 Cong. Rec. 3502; Hearings before the Committee on Civil Service, U. S. Senate, on S. 1762, 78th Cong., 2d sess., p. 8.)

The reports of the House and Senate Civil Service Committees stressed the general reemployment and rehabilitation benefits provided by the bill for those whose normal employment and mode of life had been disrupted by their service in the armed forces. The House report states (H. Rep. 1289, p. 3):

> Private employers and corporations, as well as State, county, and municipal governments, have been urged through the selective-service law and otherwise to afford reemployment to veterans when they leave the armed forces. Your committee feels that the Federal Government should set the pace, and that this proposal is an essential part of the reemployment and rehabilitation program.

Similarly, the Senate Committee's report (S. Rep. 907, p. 1) says: "The committee believes that in view of the fact that members of the armed forces

rapidly are being returned to civilian life, the bill should be enacted without delay."

The bill's sponsor, Mr. Starnes, presented it to the House with the statement that (90 Cong. Rec. 3502):

> * * * The biggest problem in the post-war period is providing jobs for able-bodied American citizens who have served in the armed forces. Jobs by which they can support themselves and their families; jobs which will permit them to retain their self-respect and feel that the country for which they have offered their all has not failed them.
>
> When this war is over and our boys come home they should not be forced to tramp the streets looking for jobs, nor to live on charity. There should be a job ready and waiting in private enterprise or with the Government, Federal, State, and local, for every American fighting man when he comes home when victory has been won.

Congressman Rees, then ranking minority member, thought that "Our Government should lead the way in the protection" of the "first right" of veterans "to their former jobs just as far as can be done when the war is over" (90 Cong. Rec. 3504); "veterans ought to have the first chance for jobs when they return from the service" (90 Cong. Rec. 3504). The debates in the House contain repeated references to "reemployment," "rehabilitation," "when the soldier returns who has been willing to fight for his country

on the fighting front," "when this war is over and our boys come home," and "when they return from service" (90 Cong. Rec. 3502, 3504, 3506).*

These legislative materials—Presidential statement, committee reports, debates—all reflect a clear Congressional purpose, with respect to World War II veterans, to confer employment preference only on those who gave up their normal pursuits and surroundings, as well as their freedom of movement, to the demands of military service.[10] The emphasis was squarely upon the

*In the course of the debate in the House of Representatives, Congresswoman Bolton asked whether the Committee had defined the "real meaning and interpretation" of "veteran," because of a general doubt "as to when a man becomes a veteran." She referred only to the problem caused by the reentry of discharged soldiers into the Army, and the difficulty of determining when such persons, with double service, become veterans. Congressman Rees replied that the Committee had not given consideration to that particular problem. (90 Cong. Rec. 3505.)

[10] Another purpose of the Act was to bring together, for the first time, in comprehensive statutory form the substance of the various existing statutory provisions, Executive Orders, and regulations dealing with veterans' preference. S. Rep. 907, p. 1; H. Rep. 1289, p. 1; 90 Cong. Rec. 3502, 3505. In this connection, the Act continued the preference previously accorded to pre-World War II veterans, wives of disabled veterans, and widows of veterans. See, *infra*, pp. 44–46.

The pre-existing statutory provisions were:

(1) R. S. 1754, 5 U. S. C. 35 (from Section 1 of the Act of March 3, 1865, 13 Stat. 571):—preference in appointments for veterans discharged for service-connected disability.

(2) Section 3 of the Act of August 15, 1876, 19 Stat. 143, 169, 5 U. S. C. 37:—preference in reduction-in-force to "those

dislocation to the veterans' civilian reemployment caused by a period of full-time active duty with the armed forces; it was these "ex-servicemen" or "veterans," in the normal sense, whom Congress was anxious to aid. The short existing preference statutes, together with the detailed implementing Executive Orders, would afford considerable protection in appointments and reductions-in-force, but Congress was anxious to embody the entire preference scheme in legislation (S. Rep. 907, p. 1; H. Rep. 1289, p. 1; 90 Cong. Rec. 3502, 3503), and to insure substantial preference and special protection for returning veterans at every stage of personnel administration—certification for appointment, appointment, reinstatement, reemployment, promotion, retention,

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persons * * * who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors."

(3) Section 4 of the Act of August 23, 1912, 37 Stat. 360, 413:—preference in reduction-in-force to "honorably discharged soldier or sailor."

(4) Section 6 of the Act of March 3, 1919, 40 Stat. 1291, 1293, as amended by the Act of July 11, 1919, 41 Stat. 35, 37, 5 U. S. C. 35:—preference in appointments to "honorably discharged soldiers, sailors, and marines, and widows of such and to the wives of injured soldiers, sailors and marines who themselves are not qualified, but whose wives are qualified to hold such positions."

(5) Section 3 of the Act of June 18, 1929, 46 Stat. 21, 5 U. S. C. 35:—same as the 1919 provision.

(6) Section 3 of the Act of June 18, 1929, 46 Stat. 21, 13 U. S. C. 203:—preference in *census* appointments to war disabled servicemen, to their widows, and to the wives of such husbands not qualified for such positions.

transfer, reduction in force, furlough, discharge, suspension, reduction in work or salary, and recertification.

The purpose to help the returning veteran would hardly be furthered by conferring preference on persons who continued their normal civilian employment during the war, who retained their relative positions in the community and the financial advantages incident thereto, whose duty assignments with the Coast Guard were selected so as to interfere as little as possible with their hours of regular civilian employment (R. 15), who served only during relative short periods each week,[11] who could be disenrolled at their own request upon representation that their duty assignments conflicted with their civilian employment (R. 15), who could not be transferred away from their homes without their consent (R. 6, 15)—who, in short, were not uprooted from their homes, their wonted mode of life, or their normal employment. On the contrary, according preference to those of respondents' class would contravene the legislative purpose by seriously diluting the preference rights of the class Congress did intend to protect and help—the

[11] The contract of enrollment referred to "a minimum of 12 hours per week" (R. 6, 51). Respondent Cohen was enrolled for approximately 72 weeks, during which his service totaled 398 hours (R. 9, 15)—an average of less than six hours a week. Respondent Hubickey was enrolled for approximately 50 weeks, during which time his service totaled 250 hours (R. 54)—an average of five hours a week.

"real" veterans, who gave up their civilian employment, and their place in the civilian community.[12] As Mr. Justice Edgerton said in his dissent below (R. 70): "It is paradoxical to suggest that Congress intended to include, and aid in the rehabilitation and reemployment of, a whole class of men whose regular employment and way of life were never interrupted. To extend employment preference to men in appellees' situation will weaken the competitive position of the veterans whom Congress intended to help. It will also weaken the competitive position of the munition makers, and the many other employees both public and private, who did essential war work but have been given no preference." Such a result would be manifestly unfair, not only to the thousands of men and women now in government service who performed full-time active duty in the armed services, but also to the competitive position of other thousands of Federal workers who also voluntarily performed essential defense work during the war but who have been given no preference. The latter would see temporary reservists, whose civilian job status during wartime did not differ substantially from their own,

[12] The decision below accords preference rights to some 125,000 individuals (the total number of persons, we are advised by the Coast Guard, who were enrolled as temporary reservists in the Volunteer Port Security Force), and their widows. The number of such persons now in Government service, or listed on civil service registers, is not available.

now advance to a preferred category solely because of the particular type of extra-curricular war work in which the reservists engaged.

b. Furthermore, there is internal evidence in the Act that Congress meant preference beneficiaries to have served full-time in the forces. We have referred to the use of "veteran" as synonymous with "ex-serviceman." The common concept of "veteran" hardly fits respondents, with their weekly duty and uninterrupted civilian life.[13] As a New York judge said in an analogous case arising under a state statute granting preference to civil war veterans (*People* v. *Adams*, 18 N. Y. Supp. 896 (Gen. Term. 1892) at 897):

> There is great doubt whether the law giving a preference in public employment to veterans was even intended to cover the case of a member of a militia regiment, temporarily called out for a few days' service in the late Rebellion. * * *. Almost all * * * militia regiments, were at some period during the war called out for temporary service; but nobody ever supposed that thereby they all became veterans by such service.

"Ex-servicemen" is also a term that one cannot, in ordinary usage, apply to temporary reservists. "When one speaks of ex-servicemen one is not

[13] Disenrolled members of the Volunteer Port Security Force may not wear the honorable discharge button, which, to the general public at least, is the distinguishing mark of the veteran.

speaking of men who always remained subject to draft; who lived at home and could not, except through the machinery of the draft, be ordered to leave home; who constantly carried on their regular civilian occupations as usual; and whose connection with the armed forces involved only part-time unpaid work which entitled them only to civilian benefits in case they were injured." Mr. Justice Edgerton, dissenting below (R. 70). In ordinary usage, "ex-serviceman" and "veteran" connote one who enlisted, volunteered, was mustered, or was inducted, into the armed services of the United States; while serving in wartime was on full-time active military duty; was entitled to receive statutory military pay and allowances; from the time of his entry into the armed services until his separation was at all times subject to military order and discipline; and during his period of service did not form a part of the civilian community. It is in this sense that these terms are commonly understood by the public, as well as by the administrators of the various acts providing benefits for those who served in the armed forces. See, *infra*, pp. 40–44. Nothing points to the belief that Congress' understanding was otherwise; rather, the clear purpose of the Act to aid in the rehabilitation of the returning veteran buttresses the normal meaning.

Other portions of the Act give cumulative evidence. With obvious thought of full-time mili-

tary duty, Section 4 establishes experience credit for "time spent in the military or naval service of the United States" where the "veteran's * * * actual employment in a similar vocation to that for which he or she is examined was interrupted by such military or naval service." Similarly, Section 12 requires that in computing length of total service for reduction-in-force purposes, "the length of time spent in active service in the armed forces of the United States of each such employee shall be credited * * *." Application of these provisions to temporary reservists, who usually lost little or no time from their regular employment, would present complications, to say the least.

We may also briefly note one other curious consequence of reading the Preference Act to cover temporary reservists. On June 27, 1944, when the Act became law, many federal employees were enrolled as temporary reservists; some had already been disenrolled; and others were thereafter separated from time to time, until the final abolition of the Volunteer Port Security Force in 1945. Since preference exists only for "ex-servicemen," former reservists would automatically receive status upon their disenrollment, while those who continued as members of the reserve would take lower rank until they, too, achieved separation. Thus, if a reduction-in-force had occurred in 1944 or early 1945, disen-

rolled reservists would have been preferred over those still performing duty as members of the temporary reserve. In 1948, this perhaps appears an amusing antiquity, but it at least tends to show that the preference structure Congress erected in 1944 was hardly adapted to the temporary reservist's hybrid status—dominantly civilian and only very subordinately military.

c. Proceedings in Congress since the pendency of the present litigation indicate a widespread view in the 80th Congress, not only that temporary Coast Guard reservists should not receive veterans' preference, but also that the lower courts have misconstrued the purpose and intent of the 78th Congress, which adopted the Veterans' Preference Act. H. R. 1389 proposes to amend Section 2 by providing that "'active duty in any branch of the armed forces of the United States' shall mean active full-time duty with military pay and allowances in any branch of the armed forces during any campaign or expedition (for which a campaign badge has been authorized)." Hearings were held by the House Committee on Post Office and Civil Service, which heard support for the bill from the American Legion, Veterans of Foreign Wars, Disabled American Veterans, the American Veterans Committee, and opposition from the Coast Guard League. Hearings before the Committee on Post Office and Civil Service, House of Representatives, 80th Cong., 1st sess.,

on H. R. 1389. The House Committee unanimously reported the bill favorably (H. Rep. 465, 80th Cong., 1st sess.), characterizing it as a clarification of the original Congressional intent, and pointing out that temporary reservists did not sustain "any dislocation from their civilian employment, and, as such, they cannot be considered in the same category as those ex-servicemen who were actually uprooted from their civilian occupations and subject to the rigors of full-time military training and combat." On June 19, 1947, the House of Representatives adopted the bill by voice vote. 93 Cong. Rec. 7464–7467 (daily ed.). A unanimous Senate Committee on Civil Service reported the bill favorably on June 27, 1947 (S. Rep. 396), likewise treating it as a clarification of the meaning of the original Act; but the Senate adjourned without considering the measure, and the bill was not taken up at the recent special session. We think that the action taken thus far on H. R. 1389, and especially the terms in which this action has been cast, are persuasive of the purpose, policy, and meaning of the Veterans' Preference Act, as it was initially enacted on June 27, 1944.[14]

[14] In the 79th Congress, S. 1465 and H. R. 3814 provided for veterans' preference for members of the Volunteer Port Security Force who served six hundred hours; S. 1613 and H. R. 6170 sought expressly to deny preference to all temporary Coast Guard reservists. None of these bills was acted upon by the 79th Congress.

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2. *Relation of the Preference Act to the Servicemen's Readjustment Act of 1944.*—Perhaps as significant in the interpretation of Section 2 as legislative statements of purpose is the close connection of the Veterans' Preference Act with the Servicemen's Readjustment Act of 1944 (the "G. I. Bill of Rights"), 58 Stat. 284, Public Law No. 346, 78th Cong., 2d sess., establishing educational benefits, unemployment allowances, loan privileges, and other benefits for veterans. Both bills were proceeding through Congress at the same time; the Preference bill was introduced on February 3, 1944, and became law on June 27, 1944; the Readjustment bill was introduced on March 13, 1944, and became law on June 22, 1944. The Readjustment bill was, of course, a fundamental measure "to facilitate the return of service men and women to civilian life." S. Rep. 755, p. 2. The similar purpose, in a much narrower sphere, of the Preference bill, we have already set forth. *Supra*, pp. 24–27. The statutes are clearly *in pari materia*, in the classic sense of "'several acts forming a general system.'" *The Amelia*, 1 Cranch 1, 35.

The striking fact is that the qualifying designations of the Servicemen's Readjustment Act do not differ substantially—except with respect to duration of service—from that of the Preference Act: "Any person who shall have served in the active military or naval service of the United States at any time on or after September 16,

1940, and prior to the termination of the present war and who shall have been discharged or released therefrom under conditions other than dishonorable after active service of ninety days or more * * * shall be eligible for the benefits of this title * * *. [i. e., Title III, Loans for the Purchase or Construction of Homes, Farms, and Business Property], 58 Stat. 291; "Any person who shall have served in the active military or naval service of the United States at any time after September 16, 1940, and prior to the termination of the present war, and who shall have been discharged or released from active service under conditions other than dishonorable, after active service of ninety days or more * * * shall be entitled" to a readjustment allowance while unemployed. [Title V], 58 Stat. 295; "Any person who served in the active military or naval service on or after September 16, 1940, and prior to the termination of the present war, and who shall have been discharged or released therefrom under conditions other than dishonorable * * * who desires a refresher or retraining course, and who * * * shall have served ninety days or more * * *" shall be eligible for and entitled to receive education or training under Title II, 58 Stat. 288.[15]

[15] The 1945 amendments to the Readjustment Act (Act of December 28, 1945, 59 Stat. 623) entitle any person who served ninety days or more in the active military or naval service to full educational benefits, and not merely refresher.

The linguistic analysis which leads respondents and the courts below to insist that temporary reservists are "ex-servicemen * * * who have served on active duty in any branch of the armed forces of the United States, during any war * * * and have been separated therefrom under honorable conditions," and therefore entitled to veterans' preference, would likewise compel them to uphold the right of honorably disenrolled reservists to the benefits of the Readjustment Act, as persons who served in the "active military or naval service" since September 1940. The applicant would, of course, have to prove ninety days service, but apparently there is a substantial number of temporary reservists who can fulfill that requirement.[16]

That the Congress could have intended to bestow the various benefits of the "G. I. Bill of Rights" upon members of the Volunteer Port Security Force is hardly conceivable. These were benefits

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training or continuance of interrupted education. 59 Stat. 624.

[16] In the Court of Appeals, an *amicus curiae* brief was filed on behalf of a temporary reservist, stated to have served 218 days on active duty, who was interested, not in veterans' preference, but in securing a G. I. loan under the Readjustment Act.

A witness representing the Coast Guard League testified at the Hearing before the Committee on Post Office and Civil Service, H. of Reps., 80th Cong., 1st sess., on H. R. 1389 (*supra*, pp. 34–35) that the League has "voluntarily disavowed any claim to monetary benefits," but that in his opinion temporary reservists were legally entitled to benefits under the Readjustment Act (pp. 35–36).

for men and women whose civilian lives and careers had been disrupted by armed service, and who needed help so that they could be "speedily reintegrated into the civilian population." S. Rep. 755, p. 2. Temporary reservists had never been removed from the civilian community, and both Congress and the public would no doubt have been outraged had it been suggested in 1944 that such persons were entitled to the new rehabilitation privileges.

Veterans' preference is a lesser benefit, and more amorphous in form, but it is clearly a substantial right to all Government employees, as well as those seeking federal employment, especially at times when budgetary considerations necessitate reductions in force. It is, moreover, a benefit granted for the same purpose that moved Congress to adopt the Readjustment Act, and by the same Congress, at the same session; it is a single part of a general rehabilitation system adopted by the 78th Congress. Enacted contemporaneously with the Readjustment Act, it should be taken together with the major statute, and its qualifying terms, so similar in phrasing, should be read in the same way. Cf. *United States* v. *Freeman*, 3 How. 556, 564–5; *United States* v. *Stewart*, 311 U. S. 60, 64. If both acts had happened to form portions of a single statute, there would be little doubt that temporary reservists would have been excluded from all benefits, re-

adjustment and preference.[17] We do not believe that the accident of the legislative process which resulted in placing the Preference Act as chapter 287 of the 58th volume of the Statutes at Large, and the Readjustment Act as chapter 268, gives leave to disregard the latter in drawing meaning from the former.

3. *Other pertinent military and veterans' legislation:*[18]

a. *National Service Life Insurance.*—National Service Life Insurance, one of the most important benefits accorded by Congress to those in the military service, is statutorily available to "every person" "enrolled" in "active service in the land or naval forces (including the Coast Guard) of the United States," if such person is ordered to active duty for a period of more than thirty days. National Service Life Insurance Act of 1940, 54 Stat. 1008, Secs. 601 (c) and 602 (a), 38 U. S. C. 801 (c) and 802 (a). Temporary Coast Guard reservists, in respondents' view, would clearly be covered by these qualifying

[17] The Veterans' Administration has ruled that temporary reservists are not eligible for any of the benefits under the "G. I. Bill of Rights." Cf. R. 27–37, esp. 29.

[18] The legislative history of the provisions of the Coast Guard Auxiliary and Reserve Act of February 19, 1941, and its amendments, under which temporary reservists were enrolled (55 Stat. 9, 12, 56 Stat. 329, 56 Stat. 1020, 1021, 14 U. S. C., Supp. V, 301–315), contains nothing indicating the views of Congress as to their status as veterans or ex-servicemen. See S. Rep. 31; H. Rep. 25; S. Rep. 1317; H. Rep. 2072; H. Rep. 2525; S. Rep. 1657, all of the 77th Congress.

words—at least as broad as those of the Preference Act—and therefore eligible to secure this Government insurance. But the Veterans' Administration, which administers the National Service Life Insurance system, consistently ruled that temporary reservists were not entitled to apply for insurance, on the ground that the act covered only those in the full-time service. R. 29; 32, 33, 37, 40, 42. This consistent, contemporaneous construction of an important related statute bears persuasively on the meaning of the kindred terms in the instant Act. Cf. *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 549; *Billings* v. *Truesdell*, 321 U. S. 542, 552–553; *United States* v. *Wyoming*, 331 U. S. 440, 454.

b. *Veterans' pension, medical, and hospital benefits.*—The Veterans' Administration has also ruled temporary reservists ineligible for the pension, medical and hospital benefits which it administers pursuant to Title I of the Act of March 20, 1933 (Public Law No. 2, 73d Congress), 48 Stat. 8, as amended, and related statutes (38 U. S. C., Chap. 12 and regulations). R. 27–37, esp. R. 29. Here, again, the qualifying terms are similar to, and certainly no narrower than, those of Section 2 of the Preference Act.[19]

[19] Veterans' Regulation No. 10 (following 38 U. S. C. 724 and 38 U. S. C., Supp. V, 735) provides:

"II. The term 'military or naval forces' shall mean the Army, the Navy, the Marine Corps, the Coast Guard, the

c. *Mustering-out pay.*—The Navy held members of the Volunteer Port Security Force "not eligible, on disenrollment, for mustering-out payments under the Mustering-Out Payment Act of 1944," 58 Stat. 8; R. 21–24, 31. The Judge Advocate General of the Navy pointed out that these temporary reservists had agreed to serve without pay and allowances; and that mustering-out pay was intended "to help service men and women tide over the difficult period of readjustment from military to civilian life." R. 23, 24.

d. *Other legislation.*—(1) The Navy Department and a federal District Court both ruled that temporary reservists were eligible for expeditious

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Naval Reserves, the National Naval Volunteers, and all other branches of the United States service while serving pursuant to law with the Army or Navy.

"III. The term 'person who served' shall mean a person, whether male or female and whether commissioned, enlisted, enrolled or drafted, who was finally accepted for active service in the military or naval forces of the United States, members of training camps authorized by law, and such other persons heretofore recognized by statute as having a pensionable status.

"IV. The term 'veteran of any war' shall include the following persons: * * * World War II—Any person who served in the active military or naval service of the United States on or after December 7, 1941, and before the termination of hostilities in the present war as determined by proclamation of the President or by concurrent resolution of the Congress: *Provided*, That the term 'active military or naval service,' as used herein, shall include active duty as a member of the Women's Army Auxiliary Corps; Women's Reserve of the Navy and Marine Corps, and the Women's Reserve of the Coast Guard."

naturalization under the amended Nationality Act of 1940, Title III, 56 Stat. 182, 50 U. S. C. App., Supp. V, 640, as persons who were serving "honorably in the military or naval forces of the United States during the present war." *Petition of Delgado,* 57 F. Supp. 460 (N. D. Cal.) (a Philippine citizen), R. 41. The terms of that statute, which does not refer to "active duty" or "servicemen," are more sweeping than those of the Preference Act; and the liberal Congressional purpose to facilitate naturalization of aliens helping to defend the country impels the broadest interpretation of the qualifying words, especially, as the District Court said, since the only non-citizens eligible for service in the Coast Guard were citizens of United States territories and possessions, including the Philippine Islands. Cf. *Petition of Agustin,* 62 F. Supp. 832, 835 (N. D. Cal.) (Filipino guerrilla naturalized); *In re Peter You Lo Chen,* D. Mass., decided November 18, 1947, 16 U. S. Law Week 2266 (December 9, 1947) (Chinese who made every effort to enter armed forces, but was never called, naturalized).

(2) The Navy Department also held that post cards for use in absentee war-time voting under the "Servicemen's Voting Law" (Act of April 1, 1944, Public No. 277, 78th Congress, 58 Stat. 136), should be distributed to temporary reservists. R. 31, 41. That statute applied, among others, to all

"members of the armed forces, inside the United States." Sec. 302 (a), 58 Stat. 141.[20]

(3) The Veterans' Administration ruled that even temporary Coast Guard reservists receiving pay and allowances were not in active service, and could therefore receive veterans' benefits or retired pay without violating the "statutes and regulations which would prohibit the payment of veterans' benefits or retired pay to persons in receipt of active service pay" (R. 33).

From this review of the qualifying terms, and the purpose of the Servicemen's Readjustment Act, the National Service Life Insurance Act, and the Mustering-Out Payment Act, it is plain that both the policy and the wording of those measures are closely related to those of the Preference Act. It also seems clear that temporary reservists are not entitled to those benefits; and the agencies who administer these statutes so hold. In our opinion, these are extremely pertinent, if not decisive considerations, in the interpretation of Section 2 of the Preference Act, and its application *vel non* to respondents.

4. *Views of the Court of Appeals.*—a. In an effort to refute the Government's contention that the Preference Act envisages full-time service

[20] The Government has never denied that temporary reservists were "members" of the Coast Guard, a branch of the armed forces of the United States, and subject to military law while on duty. Cf. *Brown* v. *Cain*, 56 F. Supp. 56 (E. D. Pa.); R. 7, 40, 41.

only, the court below argued that in the same paragraph of the Act (Section 2) Congress gave identical preference eligibility to the unmarried widows of deceased servicemen, and that, generally speaking, the "wives of servicemen continued normal civilian employment during the war" (R. 67–68). But the "unmarried widow's" right to preference is a derivative one, stemming from the services which her deceased husband performed. She is preferred, not because *she* was removed from civil life, but because her deceased husband was. It is a far, and, we submit, an insurmountable step to argue that since the widow of a veteran who went to war gets a preference even when she herself did not do so, therefore respondents who stayed at home are also entitled to a preference; for if respondents are preferred, then *their* widows must likewise be. Such an attenuation of the required degree of service would pervert the purpose and policy of the statute. Moreover, as we have pointed out above (*supra*, pp. 27–28), the Act was intended to bring together in statutory form the previous statutes, Executive Orders, and regulations relating to federal employment preference for veterans. The provision for unmarried widows of veterans was merely a continuation and incorporation in the present Act of the provisions of previous statutes. Act of August 15, 1876, 19 Stat. 143, 169, 5 U. S. C. 37; Act of July 11, 1919,

41 Stat. 35, 37, 5 U. S. C. 35; Act of June 18, 1929, 46 Stat. 21, 5 U. S. C. 35.

b. The majority of the Court of Appeals also passed lightly over respondents' part-time duties, their freedom from transfer away from home, and their continuing to remain part of the civilian community, with a reference to army personnel who performed "paper work" in offices in this country and lived with their families (R.66), and to the various kinds of limited service in the armed forces (R. 66). But all full-time military and naval personnel, whatever their duties, differed radically from respondents in being subject to military law at all times, and liable at all times to transfer elsewhere within the country, beyond the seas, or even into actual combat. This was true of those stationed in The Pentagon, as well as of limited service inductees with physical defects, and many were actually transferred and their duties sharply altered in accordance with changes in the course of the war and of manpower needs.[21] This crucial difference has been

[21] Many members of the Army Specialized Training Program, engaged in a long-term program of studying scientific, engineering, medical, and linguistic specialties, were suddenly transferred early in 1944 into infantry divisions and became, almost overnight, infantry privates, because of the pressing needs of the Army Ground Forces for replacements. Palmer, *Manpower for the Army (Part Three: The ASTP and its Effect on AGF)*, 61 Infantry Journal (No. 3, Sept. 1947), pp. 39, 43.

Waves and Spars were not subject to overseas service without their consent (Act of July 30, 1942, 56 Stat. 730, as

put, perhaps somewhat strongly, by Judge William Clark, then a member of the New Jersey Court of Errors and Appeals, in holding an army field clerk not to be a "soldier" entitled to civil service preference under the New Jersey statute (*Stephens* v. *Civil Service Comm.*, 101 N. J. L. 192, 202):

> Of course, the complexities of modern warfare have broadened that definition [i. e. of a "soldier"] considerably beyond the foot soldier who engaged in physical combat with a similar one of the enemy. Nevertheless, it seems reasonable to believe that the legislature, which was conferring a great privilege upon soldiers (at the expense of the other citizens of the state), intended to require that such privilege be enjoyed only by those whose corresponding obligations might involve them in such combat. In time of war, the President, commander-in-chief of the army, has undoubtedly the power to transfer the enlisted and commissioned personnel of the army at will, and an individual's subjection to such power would, without question, bring him within this ancient conception, because he might be transferred into the fighting forces of the army. The army field clerk, in so far as he is neither an enlisted man nor an officer, could not be

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amended, 58 Stat. 754, 34 U. S. C., Supp. V, 857c; Act of November 23, 1942, 56 Stat. 1020, as amended, 58 Stat. 754, 14 U. S. C., Supp. V, 384), but they could be stationed anywhere within the continental United States.

> so transferred or ordered to perform any duties except those of an army field clerk, which, concededly, do not involve personal contact with the enemy.

In like fashion, members of the Volunteer Port Security Force performed useful and necessary work in the furtherance of national defense, but much more than army field clerks they were removed from military control and from the possibility of sudden catapulting into new zones and kinds of life. Their contracts of enrollment specifically exempted them from transfer without consent (R. 6, 15, 51); and, both at the time of enrollment and throughout their connection with the Coast Guard, it was almost certain that their periods of duty would be intermittent, relatively short, and interfering little with their regular civilian employment, unless they themselves agreed to more extensive service (R. 6, 14–15, 51). Nor were respondents subject to military law, military orders, or military discipline during the great bulk of their time (R. 6–7, 51–52).[22]

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[22] Many civilians serving with the armed forces in theatres of operation are, of course, subject to military or naval court-martial jurisdiction at all times. Article of War 2 (d), 10 U. S. C. 1473 (d); Articles for the Government of the Navy, 34 U. S. C., Supp. V, 1201; *Perlstein* v. *United States*, 151 F. 2d 167 (C. C. A. 3), certiorari granted, 327 U. S. 777, dismissed as moot, 328 U. S. 822; *In re Di Bartolo*, 50 F. Supp. 929 (S. D. N. Y.); *In re Berue*, 54 F. Supp. 252 (S. D. Ohio). Likewise, many civilians, particularly in the Office of Strategic Services and the Civil Air Patrol, performed combat duties with great heroism and at great risk.

By the specific terms of the enrollment contracts, their military status as coastguardsmen attached only during their duty periods (R. 6, 51).

c. Rejecting all argument from the purpose or background of the Preference Act, the Court of Appeals thought the matter finally determined by the "plain" consideration "that one who has taken the military oath of service, who is a member of a component of the armed forces, who is subject to and actually engaged in military duty, and who is governed by the rules of military discipline is a 'serviceman'" (R. 64). To the contrary, with the addition of the essential facts—omitted by the court below—that respondents' military duty was performed only for a short period each week, that their military status as members of the Coast Guard Reserve attached only during their duty periods (R. 6, 51), that they were governed by military discipline only during that short period, that their civilian employment was not interrupted in any way, that they were not subject to transfer away from their homes without their consent, and that they could in all probability be disenrolled upon representation that their Coast Guard duty assignments conflicted with their civilian jobs, we think, as we have said (*supra*, pp. 31–32), that common speech would not classify respondents as "veterans" or "ex-servicemen." And when account is taken of the Preference Act's purpose, its place in the general system of veteran's benefit legislation, its close connection in

genesis and purpose with the Servicemen's Readjustment Act of 1944, and of the uniform administrative construction of related veterans' statutes, the only proper reading of Section 2 of the Act excludes temporary reservists such as respondents.

5. *Conclusion.*—That temporary reservists took a military oath, intermittently wore the Coast Guard uniform, performed part-time military duty and were intermittently subject to military law, does not automatically stamp them as "servicemen" or "veterans" for all purposes and at all times, or entitle them to all the benefits which Congress bestows upon veterans. The initial part of our argument urges that the meaning of "ex-servicemen," of "veteran," of "active duty," as of most similar terms in the field of veterans' and military legislation, must flow from the specific context and the particular purpose. *Supra,* pp. 17–23. Cf. *United States* v. *Mouat,* 124 U. S. 303, decided January 23, 1888 (Navy paymaster's clerk not an "officer" for purposes of traveling expense statute) with *United States* v. *Hendee,* 124 U. S. 309, also decided January 23, 1888 (Navy paymaster's clerk held an "officer" for purposes of salary increase act). The character, context and purpose of the Preference Act prove that in this instance temporary reservists are not "ex-servicemen * * * who have served on active duty" in the Coast Guard. To disregard this statutory context, purpose, and character, in favor

of a Procrustean definition, constructed out of formal indicia such as the military oath and the military uniform, is first to endow non-technical words with an absoluteness they do not possess, and then "to make a fortress out of the dictionary" (*Cabell* v. *Markham*, 148 F. 2d 737, 739 (C. C. A. 2)), at the expense of reason and the policy of the legislation as a whole. Cf. *Holy Trinity Church* v. *United States*, 143 U. S. 457; *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 543; *Markham* v. *Cabell*, 326 U. S. 404, 409.

II

RESPONDENTS DID NOT ACQUIRE PREFERENCE UNDER SECTION 18 OF THE VETERANS' PREFERENCE ACT BY VIRTUE OF THE CIVIL SERVICE COMMISSION'S RULING OF APRIL 4, 1944

Respondents contend, and the court below held (R. 68), that they acquired vested preference under Section 18 of the Act,[23] by virtue of the Civil Service Commission's ruling, on April 4, 1944, that all temporary Coast Guard Reservists were entitled to veterans' preference (*supra*, p. 8), which was subsequently overruled by the Commission on November 4, 1944. The argument is disproved by the terms of Section 18, its

[23] Section 18 (*infra*, pp. 66–67) provides in pertinent part: "* * * this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof."

purpose, and the character of the April 4th ruling.

A. Section 18 was mainly inserted to preserve preferences granted under earlier statutes (*supra*, pp. 27–28), and executive orders, to so-called "peacetime veterans"—those who had served in the armed forces in peacetime. The new Preference Act did not grant preference to future peacetime veterans, and Section 18 was intended as a "saving clause" to preserve the rights of such veterans then in government employment or on civil service registers. H. Rep. 1289 (dated March 27, 1944) states (p. 3) that the new Act "* * * eliminates from future preference so-called peacetime veterans, but in section 18 there is specific provision that the act is not to be construed as taking away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof." The Senate Report (S. Rep. 907, May 25, 1944) states (p. 2): "Ex-servicemen whose only service was performed during peacetime would not in the future be entitled to preference. By virtue of the provisions of section 18, however, peacetime veterans who are already in Government employment, or whose names are carried on civil-service registers on the date of enactment of this bill will not lose the

preference accorded them under existing laws and regulations." [24]

The "saving clause," then, was designed to protect the preference rights of those who were preference-entitled *veterans* on June 27, 1944, the date the new Preference Act became law, regardless of whether the new Act would itself confer such preferred status. But Section 18 was not intended to grant preference to anyone who was not a veteran on June 27, 1944, even though a then existing statute or regulation told him that if he thereafter served in the armed forces, and was honorably separated, he would become entitled to preference. Rulings and orders were not to be preserved *in toto*, but only to the extent that rights under them had already been earned. In short, Section 18 was meant to protect veterans with "vested" preference rights, and not non-veterans with no more than an opportunity to become preference-entitled veterans in the future.

But that is exactly respondents' case. On June 27, 1944, the Civil Service Commission's ruling of April 4, 1944, was outstanding, but neither respondent had any rights thereunder, because neither was a "veteran" or "ex-serviceman," in

[24] The Attorney General has ruled that a peacetime veteran is not entitled to rights under Section 14 of the Preference Act (*infra*, pp. 64–65), since that section adds rights not available under the preexisting law. 40 Op. Atty. Gen. No. 103, October 16, 1945.

any sense of those terms. Cohen had enrolled in the Coast Guard Reserve (Temporary) on April 13, 1944; he was still a member on June 27, 1944; and he was not disenrolled until September 5, 1945. *Supra,* p. 3. Hubickey did not enroll until October 18, 1944, and was not disenrolled until September 30, 1945. Even in their own eyes, neither was a "veteran," an "ex-serviceman," or "honorably discharged from the * * * naval service" on June 27, 1944, or on November 4, 1944, when the Commission recalled its earlier ruling; they could not have achieved that status, even in their own view, until September 5, 1945, and September 30, 1945, respectively. But they could not obtain preference rights until they achieved veteran's status, and on the dates in 1945 when they left the Coast Guard Section 2 of the Act was the sole provision granting rights of preference. Respondent's argument is tantamount to urging that future peacetime veterans must be accorded preference, in the teeth of Section 2 and the Congressional purpose, because the statutes and orders existing on June 27, 1944, gave preference to peacetime veterans.

B. The words of Section 18, as Mr. Justice Edgerton points out (R. 70–71), permit no other construction. The section speaks of "any preference eligible" who possessed preference rights, or to whom they were granted, before June 27, 1944.

Respondents were clearly not eligible for any kind of preference on that day, since they were not then veterans, ex-servicemen, or even former members of the armed forces; they possessed no preference, and no present rights were granted to *them* by the April 4th ruling. The most that can be said is that the ruling informed respondents that if they thereafter served in the temporary Reserve, and the ruling continued unrevoked by the Commission and unchanged by Congress, they would be granted preference rights upon their disenrollment.[25] But the passage of the Preference Act did intervene, and the Commission reviewed the prior ruling to determine whether it accorded with the new statute, as the Commission was certainly authorized to do by Sections 11 and 19 of the Act (*infra* pp. 63, 67), granting rule and regulation making power. On such review, the Commission decided that the earlier ruling did not comply with the Preference Act. (R. 16–18, 24–25.)

C. Moreover, there is considerable doubt whether the ruling of April 4th was warranted by

[25] While both respondents were enrolled subsequent to the ruling of April 4, 1944, and prior to its revocation on November 4, 1944, it cannot be urged that a subsequent right to preference was a part of their contract of enrollment. While it conceivably may have constituted a matter of inducement, it certainly was no part of the consideration for entering into the enrollment.

the then existing law, which granted preference only to "honorably discharged soldiers, sailors, and marines" and "those persons * * * who have been honorably discharged from the military or naval service of the United States." See *supra,* pp. 27–28, fn. 10. Temporary reservists were disenrolled rather than discharged (R. 9, 54), and there is good reason to believe that the Congresses which enacted the earlier preference legislation in 1876, 1919, and 1929 also intended the grant to apply only to veterans who had seen full-time service, and truly formed part of the military community. The issuance of an erroneous ruling, inconsistent with the governing statutes, could not directly confer rights upon any persons (*Manhattan General Equipment Co.* v. *Commissioner,* 297 U. S. 129, 135), nor is there any basis for asserting that an invalid ruling may confer rights upon respondents by way of estoppel. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *United States* v. *City and County of San Francisco,* 310 U. S. 16, 32; *Federal Crop Insurance Corp.* v. *Merrill,* No. 45, this Term, decided November 10, 1947. And Section 18 was clearly not intended to freeze an invalid or unauthorized ruling, made less than three months before the passage of the Preference Act, and while it was passing through Congress.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below is incorrect and should be reversed, with directions to dismiss the complaints.

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APPENDIX

1. The Veterans' Preference Act, Act of June 27, 1944, c. 287, 58 Stat. 387 (5 U. S. C., Supp. V, 851–869), provides as follows:

AN ACT

To give honorably discharged veterans, their widows, and the wives of disabled veterans, who themselves are not qualified, preference in employment where Federal funds are disbursed.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Veterans' Preference Act of 1944."

SEC. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the pres-

ent existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the War Department or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions.

SEC. 3. In all examinations to determine the qualifications of applicants for entrance into the service ten points shall be added to the earned ratings of those persons included under section 2 (1), (2), and (3), and five points shall be added to the earned ratings of those persons included under section 2 (4) of this Act: *Provided,* That in examinations for the positions of guards, elevator operators, messengers, and custodians competition shall be restricted to persons entitled to preference under this Act as long as persons entitled to preference are available and during the present war and for a period of five years following the termination of the present war as proclaimed by the President or by con-

current resolution of the Congress for such other positions as may from time to time be determined by the President.

SEC. 4. In examinations where experience is an element of qualification, time spent in the military or naval service of the United States shall be credited in a veteran's rating where his or her actual employment in a similar vocation to that for which he or she is examined was interrupted by such military or naval service. In all examinations to determine the qualifications of a veteran applicant, credit shall be given for all valuable experience, including experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether any compensation was received therefor.

SEC. 5. In determining qualifications for examination, appointment, promotion, retention, transfer, or reinstatement, with respect to preference eligibles, the Civil Service Commission or other examining agency shall waive requirements as to age, height, and weight, provided any such requirement is not essential to the performance of the duties of the position for which examination is given. The Civil Service Commission or other examining agency, after giving due consideration to the recommendation of any accredited physician, shall waive the physical requirements in the case of any veteran, provided such veteran is, in the opinion of the Civil Service Commission, or other examining agency physically able to discharge efficiently the duties of the position for which the examination is given. No minimum educational requirement will be prescribed in any civil-service examination except for such scien-

tific, technical, or professional positions the duties of which the Civil Service Commission decides cannot be performed by a person who does not have such education. The Commission shall make a part of its public records its reasons for such decision.

SEC. 6. Preference eligibles shall not be subject to the provisions of section 9 of the Civil Service Act, concerning two or more members of a family in the service, or to the provisions of section 2 of that Act concerning apportionment of appointments in the Government departments in the District of Columbia among the several States and Territories according to population, but may be required to furnish evidence of residence and domicile.

SEC. 7. The names of preference eligibles shall be entered on the appropriate registers or lists of eligibles in accordance with their respective augmented ratings, and the name of a preference eligible shall be entered ahead of all others having the same rating: *Provided*, That, except for positions in the professional and scientific services for which the entrance salary is over $3,000 per annum, the names of all qualified preference eligibles, entitled to ten points in addition to their earned ratings shall be placed at the top of the appropriate civil-service register or employment list, in accordance with their respective augmented ratings.

SEC. 8. When, in accordance with civil-service laws and rules, a nominating or appointing officer shall request certification of eligibles for appointment purposes, the Civil Service Commission shall certify, from the top of the appropriate register of eligibles, a number of names sufficient to permit the nominating or appointing officer to consider at least three names in connec-

tion with each vacancy. The nominating or appointing officer shall make selection for each vacancy from not more than the highest three names available for appointment on such certification, unless objection shall be made, and sustained by the Commission, to one or more of the persons certified, for any proper and adequate reason, as may be prescribed in the rules promulgated by the Civil Service Commission: *Provided,* That an appointing officer who passes over a veteran eligible and selects a nonveteran shall file with the Civil Service Commission his reasons in writing for so doing, which shall become a part of the record of such veteran eligible, and shall be made available upon request to the veteran or his designated representative; the Civil Service Commission is directed to determine the sufficiency of such submitted reasons and, if found insufficient, shall require such appointing officer to submit more detailed information in support thereof; the findings of the Civil Service Commission as to the sufficiency or insufficiency of such reasons shall be transmitted to and considered by such appointing officer, and a copy thereof shall be sent to the veteran eligible or to his designated representative upon request therefor: *Provided, further,* That if, upon certification, reasons deemed sufficient by the Civil Service Commission for passing over his name shall three times have been given by an appointing officer, certification of his name for appointment may thereafter be discontinued, prior notice of which shall be sent to the veteran eligible. Whenever in the Postal Service two or more substitutes are appointed on the same day, they shall be promoted to the regular force in the order in which their names appeared on the civil-

service register from which they were originally appointed, whenever there are substitutes of the required sex who are eligible and will accept, unless such vacancies are filled by transfer or reinstatement.

SEC. 9. In the unclassified Federal, and District of Columbia, civil service, and in all other positions and employment hereinbefore referred to in (c) of section 2 hereof, the nominating or appointing officer or employing official shall make selection from the qualified applicants in accordance with the provisions of this Act.

SEC. 10. The Civil Service Commission is authorized and directed to hold an examination, during the next succeeding quarterly period, for any position to which any appointment has been made within the preceding three years, for any person included under section 2 (1), (2), and (3) of this Act upon application for examination for any such position.

SEC. 11. The Civil Service Commission is hereby authorized to promulgate appropriate rules and regulations for the administration and enforcement of the provisions of this Act.

SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That preference employees whose efficiency ratings are "good" or better shall be retained in pref-

erence to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further,* That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

SEC. 13. Any preference eligible who has resigned or who has been dismissed or furloughed may, at the request of any appointing officer, be certified for, and appointed to, any position for which he may be eligible in the civil service, Federal, or District of Columbia, or in any establishment, agency, bureau, administration, project, or department, temporary or permanent.

SEC. 14. No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension

for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of same to the appellant or to his designated representative: *Provided further,* That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 15 hereof.

SEC. 15. Any preference eligible, who has been furloughed, or separated without delinquency or misconduct, upon request, shall have his name placed on all appro-

priate civil-service registers and/or on all employment lists, for every position for which his qualifications have been established, as maintained by the Civil Service Commission, or as shall be maintained by any agency or project of the Federal Government, or of the District of Columbia, in the order as provided in section 7 hereof, and shall then be eligible for recertification and reappointment in the order and according to the procedure as provided for in sections 7 and 8 hereof. No appointment shall be made from an examination register of eligibles, except of ten-point preference eligibles, when there are three or more names of preference eligibles on any appropriate reemployment list for the position to be filled.

SEC. 16. Any preference eligible who has resigned shall, upon request to the Civil Service Commission, have his name again placed on all proper civil-service registers for which he may have been qualified, in the order as provided for in section 7 hereof, and shall then be eligible for recertification and reappointment in the order, and according to the procedure, as provided for in sections 7 and 8 hereof.

SEC. 17. The term "Civil Service Commission" or "Commission" as used in this Act shall mean the present United States Civil Service Commission or any body or person who may by law succeed to its powers and duties, or any of them, or which or who may be designated by law to perform any specific duty and possess any specific power concerning matters covered by this Act.

SEC. 18. All Acts and parts of Acts inconsistent with the provisions hereof are

hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, or of any department of the Government or officer thereof.

SEC. 19. It shall be the authority and duty of the Civil Service Commission in all cases under the classified civil service to make and enforce appropriate rules and regulations to carry into full effect the provisions, intent, and purpose of this Act and such Executive orders as may be issued pursuant thereto and in furtherance thereof.

SEC. 20. Nothing contained in this Act is intended to apply to any position in or under the legislative or judicial branch of the Government or to any position or appointment which by the Congress is required to be confirmed by, or made with, the advice and consent of the United States Senate: *Provided, however,* That the provisions of this Act shall apply to appointments under Public Law Numbered 720, Seventy-fifth Congress, third session, approved June 25, 1938.

SEC. 21. If any part of this Act shall be found to be unconstitutional, the rest of it shall be considered as in full force and effect.

2. The pertinent portions of the Coast Guard Auxiliary and Reserve Act, Act of February 19, 1941, c. 8, Title II, §§ 207, 208, 209, 211, 212, 55 Stat. 12, as amended (14 U. S. C., Supp. V, 307, 308, 309, 311, 312), provide:

SEC. 207. The Commandant, with the approval of the Secretary of the Treasury or of the Secretary of the Navy, while the Coast Guard is operating as a part of the Navy, is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe, including but not limited to part-time and intermittent active duty with or without pay, and without regard to age, members of the Auxiliary, such officers and members of the crew of any motorboat or yacht placed at the disposal of the Coast Guard, and such persons (including Government employees without pay other than compensation of their civilian positions) who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty, as are citizens of the United States or of its Territories or possessions, including the Philippine Islands, to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowances of their respective ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve.

SEC. 208. Members of the Reserve, other than temporary members as provided for in section 207 hereof, shall receive the same exemption from registration and liability for training and service as members of the Naval Reserve, and no member of the Reserve, other than temporary members thereof, shall be a member of any other

naval or military organization except the Auxiliary or the Coast Guard as provided for in sections 214 and 215 of this title: *Provided,* That temporary members of the Reserve who may be members of any other military reserve, if ordered to active duty therein, shall be forthwith released from all active duty with the Coast Guard, and their status as temporary members of the Reserve terminated.

SEC. 209. All members of the Reserve when employed on active duty, or when employed in authorized travel to or from such duty, or while wearing a uniform prescribed for the Reserve, shall be subject to the laws, regulations, and orders for the government of the Coast Guard: *Provided,* That disciplinary action for an offense committed while subject to the laws, regulations, and orders for the government of the Coast Guard shall not be barred by reason of release from duty status of any person charged with the commission thereof: *Provided further,* That for the purpose of carrying the provisions of this section into effect, members of the Reserve may be retained on or returned to a duty status without their consent, but not for a longer period of time than may be required for disciplinary action.

* * * * *

SEC. 211. Members of the Reserve, other than temporary members thereof, who suffer sickness, disease, disability, or death in line of duty shall be entitled to the same benefits as are or may hereafter be prescribed by law for members of the Naval Reserve who suffer sickness, disease, disability, or death under similar conditions.

SEC. 212. (a) In case of physical injury or death resulting from physical injury—

(1) to any temporary member of the Reserve when incurred after February 19, 1941, in line of duty as a member of the Reserve, while on active duty or engaged in authorized travel to or from such duty; or

(2) to any member of the Auxiliary not on active duty as a member of the military or naval forces, when incurred after February 19, 1941, while on Coast Guard patrol pursuant to the request of competent Coast Guard authority, and which would have been incurred in line of duty in the active service had he been a member of the Reserve acting under competent orders;

the provisions of the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", approved September 7, 1916 (5 U. S. C., ch. 15), as amended, subject to the other subsections of this section, shall apply, and such Act shall be administered by the United States Employees' Compensation Commission (hereinafter called the Commission) in the same manner and to the same extent as if such person were a civil employee of the United States and were injured while in the performance of his duty: *Provided*, That for benefit computation, regardless of pay or pay status, such person shall be deemed to have had monthly pay of $150.

(b) This section shall not apply in any case coming within the purview of the workmen's compensation law of any State, Territory, or other jurisdiction because of a concurrent employment status of such member; and where such member or dependent should be entitled to a benefit under this section and also to any concur-

rent benefit from the United States on account of the same disability or death, such member or dependent shall elect which benefit he shall receive.

(c) Whenever a claim is filed with the Commission for benefits because of an alleged injury or death within the purview of this section, the Commission shall notify the Commandant and he or his designee shall investigate the facts surrounding such alleged injury and make certification with respect thereto, including certification as to such injured or deceased person's membership in the Reserve or Auxiliary and his military status, and whether the injury or death occurred in line of duty or while on Coast Guard patrol pursuant to request of competent Coast Guard authority. Such certifications shall not excuse the making of such reports as are required by such Act of September 7, 1916.

(d) Notice of injury and any claim for benefits on account of disability or death within the purview of this section which occurred prior to the enactment of this amendment, may be received as timely filed, if filed within one year from the date of the approval of this amendatory Act.

(e) In case of physical injury incurred, or sickness or disease contracted (1) by any temporary member of the Reserve while performing active Coast Guard service or (2) by any member of the Auxiliary not a regular or temporary member of the Reserve, while performing active Coast Guard patrol service pursuant to request of competent Coast Guard authority, such person shall be entitled to receive the same hospital treatment as is afforded members of the Regular Coast Guard.

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Nos. 130, 131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

HARRY B. MITCHELL, FRANCES PERKINS, ARTHUR S. FLEMMING, Individually and as Members of the Civil Service Commission, *Petitioners*,

v.

JACK W. COHEN.

HARRY B. MITCHELL, FRANCES PERKINS, ARTHUR S. FLEMMING, Individually and as Members of the Civil Service Commission, *Petitioners*,

v.

HARRY W. HUBICKEY.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

GERHARD A. GESELL,
JOHN P. FRANK,
Attorneys for Respondents.

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OPINIONS BELOW

The memorandum opinion of the District Court (R. 31-32) is not reported. The majority and dissenting opinions in the Court of Appeals (R. 37-45) are reported at 160 Fed. 2d 915.

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 1947 (R. 46). Petitioner has invoked the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether temporary members of the Coast Guard Reserve are entitled to preference in Federal employment as "ex-servicemen" within the meaning of the Veterans' Preference Act of 1944.

STATUTES INVOLVED

The relevant statutes are Section 2, Section 12, and Section 18 of the Veterans' Preference Act, Act of June 27, 1944, c. 287 Secs. 2, 12, 18, 58 Stat. 387, 390, 391 (5 U. S. C., Supp. V, §§851, 861, 867); and the Coast Guard Auxiliary and Reserve Act, Act of February 19, 1941, c. 8, Title II §§207, 208, 55 Stat. 12, as amended (14 U. S. C. §§307, 308). They are printed in the appendix.

STATEMENT

These are actions for injunctions and for declaratory judgments to require the members of the Civil Service Commission to give these respondents "preference ratings" under the Veterans' Preference Act. Respondents are entitled to such ratings if they are "ex-servicemen" within the meaning of this statute. To appreciate the legal issue, a brief description of the duties of temporary members of the Coast Guard Reserve is necessary.

Temporary membership in the Coast Guard Reserve was authorized under Section 207 of the Coast Guard Auxiliary and Reserve Act (App. 11). These Reserv-

ists did harbor and coastal patrol duty and guarded factories where sabotage was feared (R. 13-14). The temporary reservists served part time: that is to say they normally served a minimum of 12 consecutive hours a week while continuing their regular employment. (R. 16) They were not exempted from Selective Service and could be drafted while performing their temporary Coast Guard duties.

In other respects, the temporary Reservists were full-fledged members of the military organization while on duty. They were enrolled by taking the usual military oath, they wore the uniform of the Coast Guard, they could give military orders appropriate to their rank, and they were subject to military discipline. (R. 7) They were immune to civil arrest for activities in the course of duty. *Brown* v. *Cain*, 56 F. Supp. 56 (E. D. Pa. 1944). Their status was clearly stated by the Government when it took them into service. Paragraph 4 of the document entitled "Enrollment and Active Duty Assignment" (R. 7) given temporary Reservists reads as follows:

> "Your military status as a member of the U. S. Coast Guard Reserve shall attach during periods when you are actually engaged on active duty or en route to and from such duty. In the performance of your duty as a temporary member of the United States Coast Guard Reserve, you are vested with the same power and authority as members of the regular Coast Guard of similar rank, grade, or rating. You shall be subject to the laws, regulations, and orders for the government of the Coast Guard and to disciplinary action for offenses committed while subject thereto, in accordance with the provisions of Section 209 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended."

This temporary Reserve, recruited by strong appeal to patriotism, reached a membership of 70,000. (R. 12) The members averaged 40 years of age and thus were not usually subject to Selective Service. They were men who wanted to help win the war.[1]

Save for the satisfaction of a job well done, the service was completely unrewarding. The members received no compensation except a uniform allowance (R. 7). It was tough, dull, hard work to patrol the docks and harbors at least one full night a week for years on end. Many were injured and at least 39 died as a result of a frequently hazardous duty.[2]

Respondent Cohen was a temporary member of the Reserve serving from April 13, 1944 to September 5, 1945 and was on active duty on 58 days. (R. 14, 15) Respondent Hubickey was a temporary member from October 18, 1944 to September 30, 1945, serving on active duty 32 days. Cohen was a coxswain when disenrolled (R. 2) and Hubickey a seaman first class. (R. 20) Both were disenrolled under honorable conditions. (R. 8, 9, 20, 24).

At the same time, Cohen was a civilian economist with the War Department (R. 11) and Hubickey was a civilian naval architect with the Navy Department. (R. 20) Both were notified of discharges due to general reductions in force (R. 2, 20). They instituted these actions for the establishment of their veterans' preference. The District Court gave summary judgment for the respondents (R. 32, 33) and the Circuit Court of Appeals affirmed (R. 46) with Mr. Justice Edgerton dissenting.

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[1] House Report No. 1686, 78th Congress, 2d Session, H. R. 3704.
[2] Ibid.

REASONS FOR DENYING THE WRIT

I. The Decision Below Was Clearly Correct.

1. Section 2 of the Veterans' Preference Act gives preference to "ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war. . . ." The Coast Guard Reserve with which respondents served is a branch of the armed forces. Petitioner concedes the respondents served on "active duty" (R. 8). If respondents are "ex-servicemen", a term not explicitly defined in the statute, they are entitled to preference.

That the former members of the Reserve are ex-servicemen is so cogently shown by the Court below that it would be needless repetition to do more than respectfully refer the Court to the opinion of the Court of Appeals. Justice Prettyman's opinion shows that under *United States* v. *Tyler*, 105 U. S. 244 (1882) and the other cases in Justice Prettyman's fifth footnote, one is a "serviceman" who has taken the military oath, is subjected to military discipline, and is engaged in military duty. These things respondents have done.

The essence of the Government's argument is that the respondents were not sufficiently dislocated from their civilian lives to be entitled to the benefits of veterans' preference. As the Court below shows, the degree of dislocation is not a workable test for measuring the broad coverage of the Veterans' Preference Act. Concededly, the temporary Reserve members were less affected by the war than the men of Anzio. On the other hand, those who served for years in the temporary Reserve felt military service more than men released from service in the Army proper after a week or a month. Granting that Congress thought primarily of the overseas veteran in passing the Act, the Act none-

theless clearly covers millions who served in this country. The coverage of the statute must be measured by clear definable external circumstance such as the wearing of the uniform or the taking of the oath.

2. By virtue of Section 18, Section 2 cannot be construed to deprive respondents of preference eligibility. Section 18 (App. p. 10) provides that the Act should not be construed to deprive any "preference eligible" of "any rights heretofore granted to, or possessed by, him under any existing law, Executive Order, civil service rule or regulation, of any department of the Government or officer thereof." This provision operates to confirm rights existing at the time of the passage of the Act on June 27, 1944. As is shown by the opinion of Justice Prettyman, on April 4, 1944, the Civil Service Commission had issued a circular letter (number 4145) stating that temporary members of the Reserve were entitled to a veterans preference. (R. 3) The Veterans' Preference Act was itself adopted two months later while this regulation was outstanding and before the Commission changed its mind. We believed that under Section 18, the temporary members of the Reserve are entitled to the preference.

II. The Question Presented is Not Sufficiently Important to Warrant a Grant of Certiorari.

The question presented in this case has no general legal significance. It involves primarily the interpretation of one word in a statute with its own narrow legislative history. One can scarcely conceive of a case presenting a smaller legal point, or one of less general application.

Nor is there such factual significance that a determination by this Court is required. The Government

has made no showing that the question is important. It has asserted that it is "informally advised" that there were 125,000 temporary members of the Coast Guard Reserve. So far as this record shows, and so far as respondents know, the actual figure was about 70,000. (R. 12) But this is not an important case simply because a possible 70,000 persons may at one time have been members of the Reserve. The Government has made no showing, and respondents do not know, that any substantial number of persons once in that Reserve either are, were, or desire to be, Government employees.

Undoubtedly some number—we do not know how large—of temporary members of the Reserve may some time be affected by the Veterans' Preference Act. But of that number, all who have previously served in any Branch of service in the First World War or, in the case of the younger men, those who either before or after their Coast Guard membership were in other branches of the services during this war, will be unaffected by this decision. They will receive veterans' preference by virtue of their other, independent, veterans status.

If the problem is important enough to recur with frequency, it can easily arise in the Court of Claims, and this Court can await a conflict. Under Section 12 of the Veterans' Preference Act (App. p. 10), an ex-serviceman in Government employment is entitled to preference if the Government service is reduced. Any Government employee discharged in violation of a Civil Service statute can bring suit for salary in the Court of Claims, *United States* v. *Wickersham*, 201 U. S. 390 (1906), so long as he brings his claim within a reasonable time. *Nicholas* v. *United States*, 257 U. S. 71, and *Norris* v. *United States*, 257 U. S. 77 (1921). Under

earlier veterans' preference statutes, veterans did not have such a right to judicial review because of the great discretion left in the discharging official, *Keim* v. *United States*, 177 U. S. 290 (1900); but that discretion is explicitly eliminated by Section 12 of the Veterans' Preference Act of 1944 for all employees with an efficiency rating of "good" or better. For all such employees, the rule of the *Wickersham* case is thus now applicable; and this question may be put aside pending possible conflict with the Court of Claims.

In short, the petitioner has made no showing whatsoever that this is an important question by virtue of the number of persons who will be affected by it, or that there is any urgency for its decision by this Court now. Any conclusion that it is important is pure speculation.

CONCLUSION

Because the decision below was manifestly correct, and because there is no showing that the question presented is of any substantial importance, it is respectfully submitted that this petition for writs of certiorari should be denied.

GERHARD A. GESELL,
JOHN P. FRANK,
Attorneys for Respondents.

July 23, 1947.

APPENDIX

1. The pertinent portions of the Veterans' Preferance Act, Act of June 27, 1944, c. 287, Secs. 2, 12, 18, 58 Stat. 387, 390, 391 (5 U. S. C., Supp. V, 851, 861, 867), provide:

> Sec. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the War Department or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any

campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions.

SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

SEC. 13. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

2. The pertinent portions of the Coast Guard Auxiliary and Reserve Act, Act of February 19, 1941, c. 8, Title II, §§ 207, 208, 55 Stat. 12, as amended (14 U. S. C. 307, 308), provide:

> Sec. 207. The Commandant, with the approval of the Secretary of the Treasury or of the Secretary of the Navy, while the Coast Guard is operating as a part of the Navy, is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe, including but not limited to part-time and intermittent active duty with or without pay, and without regard to age, members of the Auxiliary, such officers and members of the crew of any motorboat or yacht placed at the disposal of the Coast Guard, and such persons (including Government employees without pay other than compensation of their civilian positions) who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty, as are citizens of the United States or of its Territories or possessions, including the Philippine Islands, to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowances of their respective ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve.
>
> Sec. 208. Members of the Reserve, other than temporary members as provided for in section 207 hereof, shall receive the same exemption from registration and liability for training and service as members of the Naval Reserve, and no member of the Reserve, other than temporary members

thereof, shall be a member of any other naval or military organization except the Auxiliary or the Coast Guard as provided for in section 214 and 215 of this title: *Provided,* That temporary members of the Reserve who may be members of any other military reserve, if ordered to active duty therein, shall be forthwith released from all active duty with the Coast Guard, and their status as temporary members of the Reserve terminated.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 130-131

HARRY B. MITCHELL, FRANCES PERKINS, ARTHUR S. FLEMMING, INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, *Petitioners*

v.

JACK W. COHEN

HARRY B. MITCHELL, FRANCES PERKINS, ARTHUR S. FLEMMING, INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, *Petitioners*

v.

HARRY W. HUBICKEY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENTS

OPINIONS BELOW

Both courts below held that each respondent is entitled to preference under the Veterans' Preference Act of 1944. The opinion of the District Court for the District of Columbia is reported at 69 F. Supp. 54 and

will be found both at R. 44-45 and R. 59-60. The opinions for the United States Court of Appeals for the District of Columbia are reported at 160 F. (2d) 915 and will be found at R. 62-71.

JURISDICTION

The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. § 347). Certiorari was granted on October 13, 1947.

THE QUESTION PRESENTED

Whether respondents, who petitioners have conceded served on active duty as temporary members of the Coast Guard Reserve, a branch of the armed forces of the United States, during World War II and were separated therefrom under honorable conditions, are "ex-servicemen" within the meaning of Section 2 of the Veterans' Preference Act of 1944, and hence entitled to "preference ratings" as provided in that Act.

STATUTES INVOLVED

The question presented requires an interpretation of Section 2 of the Veterans' Preference Act of 1944 (58 Stat. 387, 5 U. S. C. A. § 851), which is set forth in the Appendix, p. 28.

Pertinent portions of the Coast Guard Auxiliary and Reserve Act of February 19, 1941 (55 Stat. 12, 14 U. S. C. A. § 301), supplementing portions printed at the back of petitioners' brief, are also set forth in the Appendix, p. 29.

STATEMENT

These are actions for injunctions and declaratory judgments to require the members of the Civil Service Commission to give these respondents "preference

ratings" under the Veterans' Preference Act of 1944. Respondent Cohen was discharged from Government service due to general reduction in force after having claimed and been denied veterans' preference (R. 2, 10); while respondent Hubickey, at the time suit was filed, had been denied preference and was threatened with discharge due to reduction in force (R. 47, 56). The cases were tried on cross motions for summary judgment and the facts are not in dispute.

Petitioners admitted by their pleadings (R. 1-2, 10, 46-47, 56) and concede that each respondent

1. Served on active duty;

2. Served in a branch of the armed forces of the United States;

3. Served during a war;

4. Has been separated under honorable conditions.

The facts of record are, accordingly, primarily of significance insofar as they bear on the question whether respondents are "ex-servicemen" within the meaning of the Act.

Respondents were temporary members of the Coast Guard Reserve (R. 1-2, 9-10, 15, 46-47, 54, 56). This Reserve was authorized by the Coast Guard Auxiliary and Reserve Act of February 19, 1941 (55 Stat. 12, 14 U. S. C. A. § 301).

By statute the Coast Guard was created as "a military service" and constitutes "a branch of the land and naval forces of the United States" (14 U. S. C. A. § 301). In accordance with the statutory authorization, the President, by Executive Order No. 8929, on November 1, 1941, directed that the Coast Guard operate as part of the Navy subject to the orders of the Secretary of the Navy (6 Fed. Reg. 5581).

The Coast Guard Auxiliary and Reserve Act provides that "The Reserve shall be a component part of the Coast Guard" (Sec. 302) and that "The Reserve . . . shall be a military organization administered by the Commandant." (Sec. 304) The Reserve was established for the stated purpose of providing "a trained force of officers and enlisted personnel which, added to the regular personnel of the Coast Guard, will be adequate to enable that service to perform such extraordinary duties as may be necessitated by emergency conditions." (Sec. 301) In subsequent sections it is specified that the members of the Reserve "shall be vested with the same power, authority and privileges as members of the regular Coast Guard of similar ranks, grades or ratings"; and shall be subject to the laws, regulations and orders for the government of the Coast Guard. The enrollment of temporary members of the Reserve was specifically authorized. The Commandant, with the approval of the Secretary of Navy, was empowered to enroll temporary members for full time or part time or intermittent active duty, with or without pay, to define their powers and duties, and to confer the same ranks, grades and ratings as are provided for the personnel of the regular Reserve (Sec. 307).

Respondent Cohen was a temporary member of the Coast Guard Reserve serving from April 13, 1944, to September 5, 1945, and was on active duty on 58 days (R. 1-2, 10, 15). He held the rank of coxswain when disenrolled (R. 1-2, 10). Respondent Hubickey, who disenrolled with rank of seaman first class, served in the Reserve from October 18, 1944, to September 30, 1945, and was on active duty 32 days (R. 46-47, 54, 56). Respondents enrolled in the Reserve for the duration of the war and were assigned to the Volunteer Port

Security Force after taking the prescribed oath of allegiance (R. 6-8, 51-53). Both respondents were separated from membership in the Reserve under honorable conditions (R. 1, 10, 46, 56).

There were approximately 70,000 temporary members of the Coast Guard Reserve enrolled during World War II (R. 13, 15). Their average age was over 40 and their duties varied (Hearings H. R. 1389, 80th Cong., 1st Sess., April 18, 1947, p. 24). At the outbreak of the war some of them patrolled off the coasts and were subject to combat (R. 40). More customarily they performed sentry duty on docks and bridges, patrolled harbors and protected military and industrial shore establishments against sabotage (R. 14; Hearings H. R. 1389, 80th Cong., 1st Sess., April 18, 1947, p. 24). The work was frequently hazardous in nature. Many temporary Reservists were injured and as early as June 1944 at least 39 had died as a result of injuries received in line of duty (House Report No. 1686, 78th Cong., 2nd Sess., 1944).

Following his enrollment by taking the usual military oath (R. 8, 53), each respondent wore the regular uniform of the Coast Guard while on active duty, gave military orders appropriate to his rating and was subject to military discipline. His Enrollment and Active Duty Assignment provided that he be on active duty as directed for a minimum of 12 hours per week (R. 6, 51). While respondents were subject to call at any time for unlimited periods of active duty (R. 6, 51), in fact they served only part time and without compensation except for uniform and travel allowances, and subsistence and quarters, in kind, while on active duty, retaining their civilian jobs with the War and Navy Departments respectively (R. 2, 12, 47). They were not exempt from Selective Service (R. 7, 52). Re-

spondents' status while on active duty is succinctly stated in the following excerpt from their respective Enrollment and Active Duty Assignments:

> "Your military status as a member of the U. S. Coast Guard Reserve shall attach during periods when you are actually engaged on active duty or en route to and from duty. In the performance of your duty as a temporary member of the United States Coast Guard Reserve, you are vested with the same power and authority as members of the regular Coast Guard of similar rank, grade, or rating. You shall be subject to the laws, regulations, and orders for the government of the Coast Guard and to disciplinary action for offenses committed while subject thereto, in accordance with the provisions of Section 209 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended." (R. 6, 51)

Temporary members of the Coast Guard Reserve were entitled to preference under the rules of the Civil Service Commission in effect immediately prior and subsequent to the effective date of the Veterans' Preference Act of 1944 (R. 3-5, 10, 16-19, 48-50, 56). The Commission withdrew the preference, on the suggestion of the Navy (R. 17), sometime after the Act became operative. Respondents thereafter applied for preference in the prescribed manner (R. 2, 9-10, 47, 54, 56), were refused (R. 2, 9-10, 47, 54, 56) and initiated the present litigation.

SUMMARY OF ARGUMENT[1]

It is not disputed that respondents served on active duty as members of a branch of the armed forces of the United States during World War II and were

[1] The factual and legal references supporting statements made in this Summary will be found cited in the detailed Argument.

separated therefrom under honorable conditions. If they are "ex-servicemen" within the meaning of Section 2 of the Veterans' Preference Act of 1944, they are entitled to the "preference ratings" they seek.

A "serviceman" by the recognized common usage of the term is "one who has performed military service". Respondents performed such service as temporary members of the Coast Guard Reserve, a military organization declared by statute a component part of the armed forces of the United States. They took the customary military oath and enrolled for the duration of the war. They were subject to call at any time for unlimited periods of active duty. They wore the regular uniform of the Coast Guard suitable for their rank while on active duty. They were subject to military discipline. They possessed all the powers of regular members of the Coast Guard of the same rank while on duty, including the power of command over subordinates. They were, in the language of the Commandant of the Coast Guard, "military in every respect".

In interpreting Section 2 of the Veterans' Preference Act it is not necessary to resolve any ambiguity or inconsistency. The statute is clear on its face if the words, including the word "ex-servicemen", are given their ordinary and normal meaning. Established principles of statutory construction under these circumstances make recourse to the legislative history and other secondary sources unwarranted. Applying the words of the section in their commonly accepted sense leads neither to an absurd result nor to a result at variance with the policy underlying the statute as a whole.

Even if the legislative history is examined, however, it reveals no basis for attributing a special or technical meaning to the term "ex-serviceman". The Veterans'

Preference Act, while motivated in part by a desire to assist ex-servicemen dislocated from their civilian jobs, was drawn to have general application, and as a matter of policy was not so confined.

Petitioners' exhaustive search of the legislative history has not disclosed any valid test for determining a practical application of the term "serviceman" other than its ordinary and accepted usage. Indeed, petitioners offer no such test supported by the legislative history, but merely insist that respondents could not have been comprehended within its terms. Petitioners themselves, by their own regulations, award preference to certain temporary members of the Reserve even though these members, like respondents, were subject to the Selective Service Act and could not be transferred to other points of duty without their consent. These criteria are, accordingly, not controlling. Petitioners also contend that respondents were not dislocated from their civilian jobs. Yet many other ex-servicemen who were not so dislocated are granted preference, and neither the Act by its terms nor the legislative history affords any basis for the degree or type of dislocation which should control, nor indeed for the fact of dislocation in any sense whatsoever. Petitioners assert, contrary to fact, that temporary Reservists were not subject to combat, but are in any event obliged to admit that this is not one of the criteria, for many categories of ex-servicemen who did not experience combat, and who indeed were not eligible for combat, are granted the preference.

In the last analysis, petitioners seek to have this Court write at least four additional words into the statute so that it will, in effect, apply to "those ex-servicemen and women who have served *full time with pay* on active duty". Such a construction would be a

legislative, not a judicial, act, for the statute is not so qualified, and even if the Court looks behind its clear and unambiguous terms to the legislative history, it will find nothing in the Congressional reports or debates which suggests that only full time paid duty was contemplated. Where Congress has meant to grant benefits to veterans only upon their having performed a specific period of duty, it has so stated. The consideration of payment cannot be determinative of status, particularly in a statute which is not concerned with matters of compensation or monetary benefits.

Any doubt as to the Congressional intent to include temporary members of the Coast Guard Reserve within the term "serviceman" is resolved by the fact that this status is recognized in numerous court decisions and administrative precedents. The position of respondents is further strengthened when the Veterans' Preference Act is read as a whole and it is recognized, particularly in the light of Section 18, that temporary members of the Coast Guard Reserve under petitioners' own regulations were entitled to preference at the time the statute was enacted.

Respondents are entitled to the preference they seek.

ARGUMENT

FORMER TEMPORARY MEMBERS OF THE COAST GUARD RESERVE ARE "EX-SERVICEMEN" WITHIN THE MEANING OF THE VETERANS' PREFERENCE ACT OF 1944

ONE WHO HAS PERFORMED MILITARY SERVICE IS GENERALLY RECOGNIZED TO BE A SERVICEMAN WITHIN THE ORDINARY AND COMMONLY ACCEPTED MEANING OF THE TERM

A "serviceman"[2] is commonly defined as "one who

[2] The term "veteran", which is used interchangeably with "serviceman" in the Act has an identical meaning, being defined as "one who has seen service" (Webster International Dictionary, 2nd Ed., 1942).

has performed military service" (Webster International Dictionary, 2nd Ed., 1942).

The term is given no special statutory meaning for purposes of the Veterans' Preference Act of 1944. If the literal and obvious meaning of "ex-serviceman" is applied in interpreting the Act, no inconsistency or confusion is created. Accepting the common meaning of the term, there can be no question but that respondents are entitled to preference within the meaning of the Act, since they served subject to military orders in a branch of the armed forces and thus performed military service.

Petitioners urge that the word "ex-serviceman" is so ambiguous that it is necessary to look behind the express words of the statute and to read a special meaning into the words on the basis of the sketchy legislative history and the wording which Congress has used in *other* statutes dealing with "veterans". We fail to see the ambiguity which prompts this inquiry or the need to give the term a special meaning contrary to customary usage.

THE ACCEPTED MEANING OF THE TERM "SERVICEMAN" FINDS SUPPORT IN DECISIONS RELATING TO MILITARY SERVICE

The view that the term "serviceman" is used in its customary and ordinary meaning is fortified by the ample precedent found in decisions of this Court and lower courts dealing with comparable problems.

In *United States* v. *Tyler*, 105 U. S. 244, 246, (1882) this Court, in considering the question whether an army officer retired from active service was still in the military service of the United States, said:

> "It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon

its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service.

"If Congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it did not discharge them from their other obligations as part of the Army of the United States . . ."

The cases have been explicit in defining the tests which determine when military service has commenced. In *United States* v. *Morton*, 112 U. S. 1 (1884), this Court held that the "service" of an Army officer began when he executed the sworn agreement to serve and took the oath of office as a candidate at West Point. Similarly, in *Billings* v. *Truesdell*, 321 U. S. 542 (1944), it was held that a registrant had been inducted into service when he performed the specified ceremony by taking the short oath administered under War Department procedures.

In none of these situations where the Court has been called upon to consider the indicia of service has it placed emphasis upon the length or full time character of the service, the basis of compensation, or the serviceman's ability to retain his civilian occupation. The execution of the oath, the right to wear the uniform, the responsibility to orders of superior officers, the application of the rules and articles of war, all present in the case of respondents, have been the criteria which this Court has chosen as a basis for determining whether a man is in service. The distinction between those in and

those not in service, which petitioners urge, based upon part time voluntary or unpaid service, has never been drawn. *Wood* v. *United States*, 107 U. S. 414 (1882); *Badeau* v. *United States*, 130 U. S. 439 (1889); *Kahn* v. *Anderson*, 255 U. S. 1 (1920); *Hurley* v. *Crawley*, 50 F. (2d) 1010 (1931); *United States* v. *McIntyre*, 4 F. (2d) 823 (1925); *Morgenthau* v. *Barrett*, 108 F. (2d) 481 (1939); *Ex Parte Kruk*, 62 F. Supp. 901 (1945); and *Jorgenson* v. *Metropolitan Life Insurance Company*, 24 N. J. Misc. 22 (1945).

DECISIONS SPECIFICALLY INVOLVING THE STATUS OF TEMPORARY MEMBERS OF THE COAST GUARD RESERVE HOLD THAT THEY PERFORMED MILITARY SERVICE

The military status of the Reserve has been frequently recognized by the courts, which have uniformly held that the temporary Reservists were serving as members of the armed forces and entitled to the resulting benefits and obligations. These decisions are thus wholly consistent with the specific statutory provisions creating the Reserve as a military organization and recognizing it as a component part of the armed forces of the United States. In *Petition of Delgado*, 57 F. Supp. 460 (1944), a Philippine national, honorably disenrolled as a temporary member of the Reserve, applied for American citizenship under Section 701 of the Nationality Act of 1940, and the Court was required to decide whether the applicant had "served honorably in the military or naval forces of the United States" within the meaning of the statute. This question was answered in the affirmative by the District Judge, who stated that "The statutes make it abundantly clear that temporary members of the Coast Guard Reserve are members of the naval forces of the United States." (p. 461)

Similarly, in *Brown* v. *Cain*, 56 F. Supp. 56 (1944), the Court sustained relator's claim, raised by writ of *habeas corpus*, that he was immune from state prosecution for killing a man while on guard duty as a temporary member of the Coast Guard Reserve. The Court recognized the claim and held that relator "was a member of the armed forces of the United States." (p. 58)

To the same effect is a recent decision of the New York State Supreme Court in *Rubin* v. *Conway*, 74 N. Y. S. (2d) 166 (1947), construing the State Constitution, which provides that preference in appointment and promotion should be given any citizen of the State following "honorable discharge" as "a member of the armed forces of the United States who served therein in time of war". The Court held that a temporary member of the Coast Guard Reserve was "a member of the armed forces of the United States who served therein in time of war" and thus entitled to preference in employment.

Finally, it is not without significance that the Judge Advocate of the Navy held on July 24, 1943 that temporary members of the Coast Guard Reserve are "members of the armed forces" and considered "to be in military service" (Court Martial Orders for 1943, Part 3, page 40). Temporary members of the Reserve are credited with time spent on active duty in determining eligibility for military longevity pay (Dec. Comp. Gen. B-33903, Sept. 4, 1943). Also, they are entitled to receive military awards and decorations, *e.g.*, World War II Victory Medal and American Campaign Medal (Alcoast 148-45).

THE TERM "SERVICEMAN" IS FREE OF AMBIGUITY AND THE MEANING OF THE STATUTE IS CLEAR WITHOUT REFERENCE TO LEGISLATIVE HISTORY

There is no need for this Court to explore the legislative history of the Veterans' Preference Act, for the statute is clear on its face. Petitioners insist that a choice of construction is presented, but constant reiteration of this position does not demonstrate that in fact there is such a choice. It gains petitioners nothing merely to state that the term "ex-serviceman" has a widespread connotation at variance with part time duty. No authority has been or can be cited in support of this assertion.

The term "ex-serviceman", as has been indicated, has a normal, spontaneous and well recognized meaning which should be applied. It is a term used in plain everyday language to mean "one who has performed military service" and nothing more.[3] This Court noted in a recent case the desirability in construing a statute ". . . to stick close to the text and not import argumentative qualifications from broad, unexpressed claims of policy" (*Utah Junk Co.* v. *Porter,* 328 U. S. 39, at 44 (1946)). This view has been frequently enunciated. Thus the Court elsewhere stated:

> ". . . it would be obviously illogical to convert words of common speech used in a statute into words of

[3] Edgerton, J., in his dissent, argues (R. 70) that the term "ex-serviceman" should be given special meaning because, in his opinion, it is unlikely that Congress would have used this "awkward phrase" as a mere synonym for the simple words "persons". Should such semantic shading require explanation, it is found in the body of the section itself, where Congress was careful to make the statute applicable to both "ex-servicemen and women", thus eliminating any doubts latent in the neuter term "persons" as to the sex of preference eligibles.

> scientific terminology when neither the latter nor the science for whose purposes they were coined was within the contemplation of the framers of the statute or of the people for whom it was framed. The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken." (*United States* v. *Thind*, 261 U. S. 204, 209 (1923))

And again in *Helvering* v. *City Bank Company*, 296 U. S. 85 (1935), at 89, the Court said:

> "We are not at liberty to construe language so plain as to need no construction or to refer to committee reports where there can be no doubt of the meaning of the word used."

See, also, *Crane* v. *Commissioner of Internal Revenue*, 331 U. S. 1 (1947); *Osaka Shosen Kaisha Line* v. *United States*, 300 U. S. 98 (1936); *United States* v. *Hill*, 248 U. S. 420, 424 (1918); and *Adams Express Co.* v. *Kentucky*, 238 U. S. 190 (1914).

As was recognized in *United States* v. *American Trucking Association*, 310 U. S. 534, 543 (1939), the rule of construction embodied in the above cases is open to qualification only if the plain meaning of the statute creates an absurd result or leads to a conclusion at variance with the policy of the legislation taken as a whole. Neither of these conditions arises here.

We do not deny the Government's contention that a primary purpose of the Act was to assist ex-servicemen dislocated from their civilian jobs and we admit that these particular respondents were not so dislocated by reason of their temporary service in the Coast Guard Reserve. It is one thing to recognize such a purpose but quite another to say, as petitioners do, that the Act was limited solely to the accomplishment of this pri-

mary purpose. In plain point of fact, it was not so limited.

As the provisions of the Act itself demonstrate, it had a broad purpose and intent which was most clearly stated by Congressman Starnes, co-author of the Act, in his testimony before the Senate Civil Service Committee when he said:

> "It is a reward to a man for patriotic duties well performed; it encourages our young men and women to serve their country in an hour of need; and it makes them feel, when they have given their all or offered to give their all in defense of this country and its institutions, that a grateful country will recognize their sacrifice and service when peace comes by giving them preference for service in various capacities with their government." (Hearings S. 1762, 78th Cong., 2nd Sess. 1944, p. 8)

Thus men sent home from induction centers and training camps after a few days or weeks of service receive the preference as do men commissioned or enlisted who served with pay for one or more days to accomplish a specific task of limited duration. The fact that these men were able readily to resume their civilian employment in no way affected their right for all time to claim the benefits of the statute. There is no requirement in the statute of a minimum active duty period such as is found in companion legislation enacted at approximately the same time (Servicemen's Readjustment Act of 1944, 58 Stat. 284, 38 U. S. C. A. 693). Nor does the Act follow the dislocation theme when it grants married or unmarried widows of deceased servicemen a preference even though they continue their normal civilian employment during the war. Yet petitioners would have this Court believe that the widows of temporary members of the Coast Guard Reserve killed in

line of duty were intended to be excluded from the benefits of the Act since their deceased husbands were not separated, except by death or disability, from their civilian employment.

The dislocation test which petitioners urge is simply not found in the statute. Certainly there is no basis given for determining the degree of dislocation which should be recognized or the type of dislocation which should be recognized. Men and women serving during the war in a branch of the armed forces and separated under honorable conditions, regardless of the effect of their service upon their civilian employment, were all recognized as deserving and included under a broad statute of general application. Because respondents were subject to call at any time for unlimited active duty for the duration of the war, they could have been dislocated from their civilian jobs. The fact that they were not so called and were not so dislocated is immaterial. Obviously thousands of full time servicemen were not in fact dislocated from their civilian jobs, yet they receive preference.[4]

Nor is the result absurd. Not only did temporary members of the Coast Guard Reserve have preference at the time the statute was passed, but the Civil Service Commission initially interpreted the statute as granting such preference (R. 18-19, 24-25). And Section 18 of the Veterans' Preference Act is a clear indication of the contemporary understanding of the meaning of the term "serviceman" and of the Congressional purpose

[4] Included in this group are ex-servicemen who were able to return to their civilian jobs following the war and ex-servicemen in technical and other capacities who were placed in uniform and continued without interruption the performance of their civilian peacetime duties.

to continue the preferences for temporary Reservists authorized by existing regulations.[5] Moreover, there is nothing unreasonable in the conclusion that men who took the military oath and enrolled for the duration, who were subject to call at any time for duty of unlimited duration, who served under arms on active duty in the Coast Guard, who possessed all the powers of regularly enrolled members of the Coast Guard of the same rank while on duty, including the power of command over subordinates, who were sometimes exposed to combat, some of whom were killed in line of duty, who themselves had the authority to kill and yet be immune to civil processes, and who were liable to military discipline and entitled to wear the uniform and insignia of the United States Coast Guard are clearly servicemen within the meaning of the statute.

REVIEW OF THE LEGISLATIVE HISTORY IS COMPLETELY UNPRODUCTIVE

Petitioners' efforts to establish from the legislative history that the term "ex-servicemen" has some special

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[5] The Veterans' Preference Act became effective June 27, 1944. Prior to its enactment, the United States Civil Service Commission issued Circular Letter No. 4145 instructing Regional Directors and Division Chiefs to grant preference to temporary Coast Guard Reservists whether serving full time, part time or intermittently, and either with or without pay if honorably separated from active duty (R. 18-19). This rule or regulation was in force and effect at the time the Veterans' Preference Act became law. Temporary members of the Coast Guard Reserve serving in the same capacity as respondents were entitled to preference. Indeed, immediately following the effective date of the Act, the Civil Service Commission reaffirmed its ruling (R. 4, 10, 49, 56). Respondents thereafter were enrolled as temporary Coast Guard Reservists, and it was not until later that the Commission revoked its prior ruling (R. 24-25), thus precipitating this litigation.

meaning when used in the Veterans' Preference Act has, moreover, not been successful. Its elaborate search of the legislative history has established nothing which justifies giving this term a meaning contrary to ordinary usage. The most that petitioners can squeeze from the debates and committee reports is its broad argument as to the principal, but not exclusive, statutory purpose which has been considered above.

Petitioners proceed to the legislative history on the theory that the statutory provision here in issue, "like most other statutes in the field of military and veteran legislation, can properly be read only in the light of its policy, purpose, context and history." There is ample evidence that veteran statutes enacted at different times, for different purposes and under different conditions all have different application. Petitioners, however, offer no formula by which this varied legislation can be interpreted consistent with a harmonious series of definitions and objectives. In fact, this legislation is not consistent and was never intended to be. There is no basis in law or fact for the unique theory petitioners now assert.

It requires little analysis of petitioners' argument to demonstrate that essentially what it is seeking is a revision of the legislation by court action, a wholly improper objective. If the suggestion of petitioners is adopted, this Court must write at least four additional words into the statute so that it reads: "those ex-servicemen and women who have served *full time with pay* on active duty," etc. To write these words into the statute would be a legislative, not a judicial, act, for there is not a single suggestion in the body of the statute itself, or in the legislative history, that the compensation of the ex-serviceman or the full or part time nature

of his duties was ever given any consideration. (90 Cong. Rec. 3505; 1944, 78th Cong. 2nd Sess.). Indeed, quite the contrary, for the legislative history shows that there was no effort made to define the term "veteran" with any precision, and this is a term which petitioners claim to be synonymous with "ex-serviceman".

Petitioners, moreover, do not find in the legislative history any indication that a specific meaning was intended by the term "serviceman" as used in the Veterans' Preference Act other than its common usage, and do not offer to this Court a definition of the term which it can apply uniformly to the many situations which may arise in the interpretation of the Act. It is stated categorically that these respondents could not have been intended to be included, but the Court is left without guidance as to where any line of demarcation between those to be included and those to be excluded within the broad terms of the statute shall be drawn.

Throughout their brief petitioners make constant reference to the fact that respondents continued to be subject to the Selective Service Act while serving as temporary members of the Coast Guard Reserve, and to the fact that as members of this Reserve respondents could not be assigned to duty away from home without their consent. It is repeatedly suggested that these two circumstances demonstrate that respondents' service was not of the type which Congress intended to comprehend within the term "serviceman". There is no specific legislative history to support this position. Moreover, petitioners cannot be heard to advance the argument for it is contradicted by their own regulations. The regulations of the United States Civil Service Commission specifically provide that temporary members of the United States Coast Guard Reserve serving full time with pay are entitled to veterans' preference (R. 4).

Yet such members of the Reserve, like respondents, continued to be subject to the Selective Service Act and also could not be assigned for duty away from home without their consent. Surely such grant of preference is wholly inconsistent with petitioners' position here. The Civil Service Commission's own regulations must be taken as concessions that neither immunity from draft nor the need of acquiescence in orders transferring a serviceman to another point of duty are indicia which control the determination of "ex-serviceman" status.

Petitioners also make the argument that these temporary members of the Coast Guard Reserve are not eligible to receive preference since it has been held administratively that they are not eligible for National Service Life Insurance, pensions, medical and hospital benefits, etc. This position is in direct conflict with petitioners' own regulations. The Administrator of Veterans' Affairs has ruled that no temporary member of the Reserve, regardless of pay status or duty status, is entitled to these benefits (R. 37). Yet petitioners' own regulations provide that the temporary members of the Reserve who served full time with pay are entitled to veterans' preference (R. 4). This is sufficient to demonstrate that eligibility for the benefits in question is not one of the controlling criteria for determining serviceman status.

Respondents are clearly "ex-servicemen" within the meaning of the Act and entitled to preference ratings under the unequivocal statutory direction.

A REPLY TO CERTAIN INACCURACIES AND ARGUMENT PRESENTED IN PETITIONERS' BRIEF.

1. Petitioners, throughout their brief, have sought to minimize the obligations to serve assumed by respondents at time of enrollment. The enrollment and as-

signments which are in the record provide for active duty for a minimum of 12 hours per week (R. 6, 51), not 6 as petitioners state in their brief (p. 29, note 11). Since petitioners served at the order of the Commandant, or his subordinates, the average time served was subject to variance under conditions which respondents did not control. Moreover, this was a minimum period. Competent authorities of the Coast Guard Reserve had power to order longer periods of duty up to full time duty (R. 6, 51). There was not, as petitioners state, any term of the enrollment which assured respondents that they could continue their regular civilian employment (R. 6-8, 51-53). Respondents were always subject to full time duty assignment (R. 6, 51).

2. The suggestion in petitioners' brief that temporary members of the Coast Guard Reserve could be disenrolled merely *at their own request* if their duty assignments conflicted with their civilian work is not supported by the record. No member of the Reserve could control, by resignation or otherwise, the duration of his enrollment. The enrollment and active duty assignment specifically stated "the period of your enrollment shall be for the duration of the war upon the completion of which you will be disenrolled, unless the period of your enrollment is sooner terminated by Coast Guard authority" (R. 6, 51). Obviously under this explicit language only the determination by responsible officers of the Reserve controlled the period of the Reservist's service. All other members of the military forces of the nation served under like terms and conditions (*Re* Navy, see Naval Reserve Act of 1938, 52 Stat. 1175, 34 U. S. C. A. Sec. 853; and Army, see Act of December 13, 1941, 55 Stat. 800, 50 U. S. C. A. § 732).

3. Petitioners argue that the "contemporaneous enactment" of the Servicemen's Readjustment Act of 1944 (58 Stat. 284) demonstrates that Congress, in the Veterans' Preference Act, intended to include under the term "ex-servicemen" only persons serving full time. Quite the contrary is the case, for in this contemporaneous act Congress was careful to state that the benefits would not accrue until "after active service of 90 days or more". Had any such limitation been in the minds of Congress in enacting the preference legislation, why should it not have been equally and explicitly stated? The bills were enacted at the same time and a clear distinction exists, as was intended.

4. Petitioners seek to magnify the significance of a decision in this case affirming the lower court and granting respondents preference. While the record shows that there were but 70,000 temporary members of the Coast Guard Reserve (R. 13, 31), petitioners claim that there were 125,000. Whichever the figure, certain temporary members of the Coast Guard Reserve, under petitioners' own regulations, are admittedly entitled to preference which reduces the group affected by the decision. Many others, of course, have no practical interest in the preference because they are not now and do not hereafter contemplate becoming federal employees. Some of the group affected are not in fact involved because, as the record shows, numerous members of the Reserve were later drafted or enlisted and are entitled to preference by reason of service in other branches of the armed forces (R. 15); and from 50% to 60% of the entire group are veterans of World War I and therefore entitled to preference in any event (Hearings H. R. 1389, 80th Cong., 1st Sess., April 18, 1947, p. 30). In fact, the group materially affected by

this decision is very small and the determination can have no substantial influence upon the operations of the Civil Service Commission in administering veterans' preference.

5. Petitioners point to the fact that, since the institution of this litigation, proceedings in Congress indicate a widespread view that temporary members of the Coast Guard Reserve should not receive veterans' preference. Various bills have been introduced specifically granting the preference or taking it away. These are all in the form of amendments to the existing Act. It is also true that a bill which would remove the preference has been passed in the House of Representatives and has received favorable consideration by the Senate Committee on Civil Service. The bill, however, received consideration on the floor of the Senate and failed of passage when called on the unanimous consent calendar (80th Cong., 1st Sess. 1947, Cong. Rec. Vol. 93, No. 142, July 23, 1947). The very fact that this legislation is deemed necessary by those who seek to have the preference denied demonstrates that the statute as now written, which is the statute which this Court is called upon to construe, grants such preference.

6. Petitioners incorrectly state that the legislative history of the provisions of the Coast Guard Auxiliary and Reserve Act of February 19, 1941, and its amendments, "contains nothing indicating the views of Congress" as to the status of temporary Reservists as veterans or ex-servicemen. The following quotations from the legislative history refute petitioners' contention.

The Coast Guard Reserve, in which respondents served, was created by the Coast Guard Auxiliary and

Reserve Act of 1941, 55 Stat. 12, 14 U. S. C. §260 (Supp. V), and was an integral part of the Coast Guard, bearing the same relation to the regular Coast Guard that the Naval Reserve bears to the regular Navy. In the House Report on the bill (House Report No. 25, 77th Cong., 1st Sess. 1941) it is said at page 5:

> "Section 201 creates and establishes a new Coast Guard Reserve which will be military in character and which is modeled after the Naval Reserve as far as is practicable . . ."

The then Commandant of the Coast Guard, the late Rear Admiral Russell R. Waesche, testified in behalf of the bill (Hearings on H. R. 562, 77th Cong., 1st Sess., January 28, 1941, p. 17):

> ". . . The members who are brought in as temporary reservists, who are also military in every respect, will be brought into the military reserve for duty in a particular locality . . . They will be called to active duty and have military rank and military pay and all of the authority and responsibility of the regular Coast Guard officers, but they will operate only in the particular locality where they are enrolled . . ."

7. Petitioners make much of the fact that temporary members of the Coast Guard Reserve are, by administrative rulings, not now included under the terms of other veteran statutes such as the Servicemen's Readjustment Act and the Mustering-out Payment Act. These acts have different wording and accomplish different purposes. To the extent monetary compensation is involved, they obviously are to be read and interpreted in the light of the fact that these particular temporary Reservists were not compensated. By having agreed to serve without pay at the time of enrollment,

these Reservists clearly waived rights to certain monetary compensation, but this should not militate against them in interpreting the present statute.

Petitioners are forced to concede temporary Reservists are included within the provisions of the Soldiers' Voting Law (Navy Court Martial Orders for 1944, Part 2, p. 255), are eligible for the World War II Victory Medal and for the American Campaign Medal, and are entitled to burial in national military cemeteries. The conflicting applicability of statutes and regulations affecting servicemen adds little to the resolution of the problem of statutory interpretation here presented.

8. Petitioners argue that temporary Reservists may not properly be considered servicemen since, by statute, their compensation in the event of permanent disability is governed by the provisions applicable to civilian rather than military personnel. Apart from the fact that the compensation in both cases is comparable and was made so designedly (R. 36), it should be pointed out that the statutory provision was prompted by the peculiar circumstances under which temporary Reservists were enrolled and was not intended to reflect the different character of service performed. Temporary Reservists were, in the main, recruited from a group who were either exempt from the Selective Service Act or at an age level where it was unlikely that they would be drafted. Since the men and women in this group were of an average age of over 40 years (Hearings H. R. 1389, 80th Cong., 1st Sess., April 18, 1947, p. 24) and enrollment was made without regard for strict medical standards, it was felt that disabilities arising after service might, in part, be the result of service and, in part, be the result of normal causes. For this reason Congress properly felt it more appropriate to provide dis-

ability compensation on the basis specified in the statute, thus avoiding the necessity for effecting retirements for physical disability in the manner afforded other military personnel. (See statement of Admiral Waesche, House Hearings on H. R. 562, 77th Cong., 1st Sess., January 28, 1941, p. 10). These considerations, however, in no way reflect a Congressional attitude as to the nature of the services being performed.

CONCLUSION

Respondents are entitled to preference under the provisions of the Veterans' Preference Act of 1944 and the judgments of the courts below should be affirmed.

Respectfully submitted,

GERHARD A. GESELL,
Attorney for Respondents.

December, 1947.

APPENDIX

1. Sections 2 and 18 of the Veterans' Preference Act, Act of June 27, 1944, c. 287, 58 Stat. 387 (5 U. S. C., Supp. V, 851-869), provide as follows:

> "Sec. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service (b) the unclassified civil service (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connection disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the War Department or the Navy Department; (2) the wives of such service-connected disabled ex-service men as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign

badge has been authorized), and have been separated therefrom under honorable conditions."

"Sec. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, or of any department of the Government or officer thereof."

2. Pertinent portions of the Coast Guard Auxiliary and Reserve Act, Act of February 19, 1941, c. 8, Title II, §§ 301, 302, 303, 304, 305, 306, 55 Stat. 12, as amended (14 U. S. C., Supp. V, 301-306), provide as follow:

"Sec. 301. There is hereby created and established a United States Coast Guard Reserve (hereinafter referred to as the 'Reserve'), the purpose of which is to provide a trained force of officers and enlisted personnel which, added to regular personnel of the Coast Guard, will be adequate to enable that service to perform such extraordinary duties as may be necessitated by emergency conditions.

"Sec. 302. The Reserve, which shall be a component part of the Coast Guard shall be composed of citizens of the United States and of its Territories and possessions, including the Philippine Islands, between the ages of seventeen and sixty-four, who are physically and otherwise qualified for the performance of duty with the Coast Guard, and who, through appointment or enlistment therein, obligate themselves to serve in the Coast Guard in time of war or during any period of national emergency declared by the President to exist.

"Sec. 303. The ranks, grades, and ratings, including cadets, in the Reserve shall be the various ranks, grades, and ratings not above captain, pre-

scribed by law for the Coast Guard: *Provided*, That no officer shall be initially appointed in the Coast Guard Reserve in the grade or rank of captain or commander.

"Sec. 304. The Reserve shall be a military organization administered by the Commandant, under the direction of the Secretary of the Treasury, and the Commandant shall, with the approval of the Secretary of the Treasury and the concurrence of the Secretary of the Navy, prescribe such regulations as may be necessary to effectuate the purposes of this subchapter.

"Sec. 305. Any member of the Reserve may be ordered to active duty by the Commandant in time of war or during any period of national emergency declared by the President to exist and be required to perform active duty throughout the war or until the President declares that such national emergency no longer exists; but in time of peace, except for disciplinary purposes as provided in section 309 hereof, no such member shall be ordered to or continue on active duty without his consent: *Provided*, That the Commandant may release any member from active duty either in time of war or in time of peace. Members of the Reserve while engaged on active duty shall be vested with the same power, authority, rights, and privileges as members of the regular Coast Guard of similar ranks, grades, or ratings. In time of peace members of the Coast Guard Reserve may, with their consent, be given additional training or other duty either with or without pay, as may be authorized by the Secretary of the Treasury. When authorized training or other duty without pay is performed by members of the Reserve they may, in the discretion of the Secretary of the Treasury, be furnished with transportation to and from such duty, with subsistence, and transfers en route and, during the performance of such duty, be furnished subsistence

in kind or commutation thereof at a rate to be fixed from time to time by the Secretary of the Treasury.

"Sec. 306. Commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Reserve when engaged on active duty, on active duty while undergoing training, on training duty with pay, or when engaged in authorized travel to or from such duty, shall receive the same pay and allowances as are received by commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Naval Reserve of the same rank, grade, rating, and length of service; pay and allowances of cadets of the Reserve shall under the same conditions, for the same purposes, and in the same manner, be assimilated to the pay and allowances of midshipmen of the Naval Reserve. In determining length of service for the purposes of this section, there shall be included (a) all periods of active duty under this chapter, except active duty while undergoing training, and (b) all other service for which credit is given by law to members of the regular Coast Guard. When members of the Reserve perform active duty or active duty while undergoing training for a period of less than thirty days, such duty performed on the thirty-first day of any month shall be paid for at the same rate as for other days: *Provided,* That members of the Reserve while engaged on active duty which involves the actual flying in aircraft in accordance with regulations prescribed by the Commandant shall receive the same increase of pay of their ranks, grades, or ratings as may be received by members of the regular Coast Guard in similar ranks, grades, or ratings, for the performance of similar duty."

pp. 8 + 10.

SUPREME COURT OF THE UNITED STATES

Nos. 130–131.—October Term, 1947.

Harry B. Mitchell, Frances Perkins, Arthur S. Flemming, Individually and as Members of the Civil Service Commission, Petitioners, 130 *v.* Jack W. Cohen. Harry B. Mitchell, Frances Perkins, Arthur S. Flemming, Individually and as Members of the Civil Service Commission, Petitioners, 131 *v.* Harry W. Hubickey.	On Writs of certiorari to the United States Court of Appeals for the District of Columbia.

[March 8, 1948.]

Mr. Justice Murphy delivered the opinion of the Court.

The problem here is whether temporary members of the Volunteer Port Security Force of the Coast Guard Reserve are entitled to veterans' preference in federal employment by virtue of the Veterans' Preference Act of 1944.[1]

Pursuant to § 207 of the Coast Guard Auxiliary and Reserve Act of 1941,[2] approximately 70,000 persons were enrolled as temporary members of the Coast Guard Reserve. The Reserve was a military organization established as a component part of the Coast Guard "to enable that service to perform such extraordinary duties as may be necessitated by emergency conditions."[3] The Coast

[1] 58 Stat. 387, 5 U. S. C. § 851.

[2] 55 Stat. 9, 12, as amended, 14 U. S. C., Supp. V, § 307.

[3] § 201 of the Coast Guard Auxiliary and Reserve Act of 1941, 55 Stat. 9, 11, as amended, 14 U. S. C., Supp. V, § 301.

Guard, in turn, was created as a military service and constitutes "a branch of the land and naval forces of the United States."[4] On November 1, 1941, the President directed that the Coast Guard operate as part of the Navy subject to the orders of the Secretary of the Navy.[5]

Of the various classifications of temporary members of the Coast Guard Reserve,[6] the largest was known as the Volunteer Port Security Force. Service therein was purely voluntary and was devoted to such activities as the patrol and guarding of harbors, waterfronts, docks, bridges, ships and industrial shore establishments. The members of this force took the oath of allegiance required of the regular members of the Coast Guard. They were enrolled "for the duration of the war upon the completion of which you will be disenrolled unless the period of your enrollment is sooner terminated by Coast Guard authority."[7] In actual practice, however, the members were usually permitted to leave the Force at any time by making a request to the commanding officer of the unit to which they were assigned. They were given a "Certificate of Disenrollment" upon severance from the Force, honorable discharges and mustering-out pay not being provided.

Members of the Volunteer Port Security Force were obligated to be on active duty "only as directed by com-

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[4] 55 Stat. 585; 14 U. S. C. § 1.

[5] Executive Order No. 8929, 6 Fed. Reg. 5581.

[6] The other classifications were: (1) Full-time active duty with military pay and allowances; (2) Pilots without pay and allowances other than for uniforms, but paid by their own companies; (3) Officers of Great Lakes vessels without pay and allowances other than for uniforms, but paid by their own companies; (4) Coast Guard police without pay and allowances; (5) Civil Service employees of the Coast Guard enrolled for full-time active duty without pay other than compensation for their civilian positions.

[7] From the form entitled "Temporary Member of Coast Guard Reserve—Enrollment and Active Duty Assignment."

petent authority for a minimum of 12 hours per week."[8] It does not appear that their active duty exceeded that amount to any substantial degree. Because of the small number of hours of service, most members were able to continue their regular civilian employment with little or no interference. They could not be transferred from the cities in which they lived without their consent. Efforts were made by the Coast Guard to assign the 12-hour weekly duty periods to fit the convenience of the members. And many of them were disenrolled at their own request upon representations that their duty assignments conflicted with their civilian employment. They could also be excused from duty if they found it temporarily inconvenient.

These members performed their duties without pay. In most cases, however, they received an allowance for uniforms; and in some instances they received food or subsistence allowance while on active duty. Military status attached to them only during periods when they were actually engaged on active duty or en route to and from such duty. While on active duty they wore their uniforms, were subject to the usual Coast Guard discipline and were vested with the same authority as members of the regular Coast Guard of similar rank.

At all times the members of the Volunteer Port Security Force remained subject to the Selective Training and Service Act of 1940. They were required to register and were liable for induction into the regular armed forces. In fact, many of them did enlist or were drafted into those forces, thereby necessitating their disenrollment as temporary members of the Coast Guard Reserve. If illness or disease occurred while on duty, they were accorded the same hospital treatment as members of the regular Coast

[8] *Ibid.* It also appears from this form that those mentioned in classifications (2) and (5) in footnote 6, *supra*, were subject to call at all times. Apparently the other classifications, including the Volunteer Port Security Force, were not subject to such a call.

Guard. But if they were injured or killed in the line of duty, they were entitled only to the benefits prescribed by law for civilian employees of the United States. Moreover they were ineligible for the benefits of National Service Life Insurance.

Respondent Cohen enrolled on April 13, 1944, as a member of the Volunteer Port Security Force and was assigned to duty with the Captain of the Port, Washington, D. C. He performed his part-time duties without compensation and without interruption to his regular employment as a civilian economist in the War Department. He was disenrolled on September 5, 1945, having served on active duty on 58 days for a total service of 398 hours. Respondent Hubickey was enrolled in the Force on October 18, 1944, and was assigned to duty with the Captain of the Port, Philadelphia, Pa. He too performed his part-time duties without compensation and without interference with his regular work as a civilian naval architect in the Navy Department. On September 30, 1945, he was disenrolled, having served on active duty on 32 days for a total service of 250 hours.

On April 4, 1944, before the passage of the Veterans' Preference Act, the Civil Service Commission had ruled that the duties performed by those enrolled in the Volunteer Port Security Force entitled them to veterans' preference in federal employment under the then existing preference laws.* But on November 4, 1944, after the

*Circular Letter No. 4145 to Regional Directors and Division Chiefs of the Commission. This provided that active duty performed by temporary members of the Coast Guard Reserve, whether full-time, part-time, or intermittently, either with or without pay, including Government employees enrolled without pay other than the compensation of their civilian positions, constituted active duty as distinguished from training duty and entitled the member performing such duty to preference benefits under the then existing preference laws.

enactment of the statute in question and pursuant to a recommendation of the Acting Secretary of the Navy, the Commission changed this ruling and decided that such duties did not entitle one to veterans' preference under the terms of the statute.[10]

The two respondents were denied veterans' preference in their government employment in accordance with the Commission's second ruling. Due to general reductions in force, respondent Cohen was discharged from the War Department and respondent Hubickey was notified that he would be discharged from the Navy Department. They then brought these actions to compel the members of the Commission to classify them as preference eligibles; they also asked the court to adjudge and declare them entitled to the status of preference eligibles under the provisions of the Veterans' Preference Act. The District Court granted summary judgments in their favor. 69 F. Supp. 54. The Court of Appeals affirmed, one justice dissenting. 160 F. 2d 915. We brought the cases here on certiorari, the problem raised being one of importance in the administration of the Veterans' Preference Act.

The pertinent portion of the Veterans' Preference Act is to be found near the end of § 2. That establishes preference in government employment for "those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, . . . and have been separated therefrom under honorable conditions."

Respondents claim that their service with the Volunteer Port Security Force brings them squarely within this

[10] Departmental Circular No. 508 to Heads of Departments and Independent Establishments. This modified the earlier ruling and provided that only those temporary Coast Guard Reservists performing full-time duty with pay and allowances at shore stations or aboard Coast Guard vessels were entitled to preference under the Veterans' Preference Act of 1944.

statutory provision, hence entitling them to veterans' preference. It is undisputed, of course, that they did serve part-time on active duty in a branch of the armed forces of the United States during World War II and that they were separated therefrom under honorable conditions. The crucial question is whether they thereby are "ex-servicemen" within the meaning of this particular statute. On that score, respondents urge that this term must be given its ordinary and literal meaning so as to refer to all those who performed military service.[11] The length or continuity of active duty and the presence or absence of compensation become immaterial from respondents' point of view; the mere performance of some type of military service is thought to be sufficient. Since respondents concededly did perform military service while on intermittent active duty with the Volunteer Port Security Force, the conclusion is reached that they are "ex-servicemen" within the contemplation of this statute. Resort to the legislative history and other secondary sources is said to be unwarranted, so clear and obvious is the meaning of that term.

In our opinion, however, the term "ex-servicemen" has no single, precise definition which permits us to read and apply that term without help from the context in which it appears and the purpose for which it was inserted in the statute. Ex-servicemen are indeed those who have performed military service. And they may include those who have served on active duty only part-time and without compensation. But this designation may also be confined to a more definite and narrow class of individuals who performed military service, to those whose full time and efforts were at the disposal of military authorities and whose compensation included military pay and allowances. Such ex-servicemen are those who completely dis-

[11] Respondents point out that the word "serviceman" is defined as "one who has performed military service." Webster's New International Dictionary, 2d ed. (1942).

associated themselves from their civilian status and their civilian employment during the period of their military service, suffering in many cases financial hardship and separation from home and family. They formed the great bulk of the regular armed forces during World War II. In the popular mind, they were typified by the full-fledged soldier, sailor, marine or coast guardsman. Our problem, of course, is whether Congress used the term "ex-servicemen" in the broad or narrow sense when it enacted the Veterans' Preference Act. And the answer to that problem is to be determined by an examination of the statutory scheme rather than by reliance upon dictionary definitions.

The Veterans' Preference Act was enacted in 1944 to aid in the readjustment and rehabilitation of World War II veterans. It was felt that the problems of these returning veterans were particularly acute and merited special consideration. Their normal employment and mode of life had been seriously disrupted by their service in the armed forces and it was thought that they could not be expected to resume their regular activities without reemployment and rehabilitation aids. The Federal Government, in its capacity as an employer, determined to take the lead in such a program.[12] The Veterans' Pref-

[12] "I believe that the Federal Government, functioning in its capacity as an employer, should take the lead in assuring those who are in the armed services that when they return special consideration will be given to them in their efforts to obtain employment. It is absolutely impossible to take millions of our young men out of their normal pursuits for the purpose of fighting to preserve the Nation, and then expect them to resume their normal activities without having any special consideration shown them.

"The problems of readjustment will be difficult for all of us. They will be particularly difficult for those who have spent months and even years at the battle fronts all over the world. Surely a grateful nation will want to express its gratitude in deeds as well as in words."

Letter from the President to Rep. Ramspeck, quoted in H. R. Rep. No. 1289, 78th Cong., 2d Sess., p. 5.

erence Act was accordingly adopted, creating special preferance and protection for returning veterans at every stage of federal employment.

Throughout the legislative reports and debates leading to the birth of this statute is evident a consistent desire to help only those who had sacrificed their normal pursuits and surroundings to aid in the struggle to which this nation had dedicated itself.[13] It was the veterans or ex-servicemen who had been completely divorced from their civilian employment by reason of their full-time service with the armed forces who were the objects of Congressional solicitude. Reemployment and rehabilitation were considered to be necessary only as to ~~ex-servicemen whose regular employment had been disrupted and whose regular life had been uprooted~~.

There is nothing to indicate that the legislative mind in this instance was directed toward granting special benefits or rewards to those who performed military service without interference with their normal employment and mode of life. As to them, assistance in reemployment and rehabilitation was thought unnecessary. Their civilian employment status remained unchanged by reason of their military service. And since their civilian life was substantially unaltered, there was no problem of aiding their readjustment back to such a life. Indeed, to have given them preference rights solely because of their

[13] H. R. Rep. No. 1289, 78th Cong., 2d Sess.; S. Rep. No. 907, 78th Cong., 2d Sess.; 90 Cong. Rec. 3501–3507. The House report stated (p. 3): "Private employers and corporations, as well as State, county, and municipal governments, have been urged through the selective-service law and otherwise to afford reemployment to veterans when they leave the armed forces. Your committee feels that the Federal Government should set the pace, and that this proposal is an essential part of the reemployment and rehabilitation program.". The Senate report stated (p. 1): "The committee believes that in view of the fact that members of the armed forces rapidly are being returned to civilian life, the bill should be enacted without delay."

part-time military service would have been inconsistent with the professed aims of the statutory framers. Such preference would have diluted the benefits conferred on those ex-servicemen who had made full-scale sacrifices; and it would have been inequitable to the many civilians who also had participated voluntarily in essential war and defense activities but who had not been directly connected with a branch of the armed forces.

It is true that § 2 of the Act establishes preference eligibility for the unmarried widows of deceased ex-servicemen despite the fact that these widows may have continued their normal civilian employment during the war. But the preference rights thereby granted are derivative in nature. They are conferred on the widows because of the dislocation and severence from civil life which their deceased husbands suffered while performing full-time military duties and in partial substitution for the loss in family earning power occasioned by their husbands' deaths. Congress felt that this was one way of expressing the moral obligation and the debt of gratitude which this nation was thought to owe these widows. Such a provision certainly affords no basis for widening the concept of "ex-servicemen" beyond that which we have indicated. The widows of ex-servicemen are in a special category which cannot be compared, in terms of sacrifice or need for reemployment and rehabilitation, with any group of individuals who performed part-time military duties.[14]

In the light of the very clear purpose which Congress had in mind in adopting the Veterans' Preference Act,

[14] The same observations apply to the provision in § 2 giving veterans' preference to the wives of ex-servicemen who have a service-connected disability and who themselves have been unable to qualify for any civil-service appointment. See also Public Law 396, 80th Cong., 2d Sess., approved Jan. 19, 1948, extending veterans' preference benefits to the widowed mothers of deceased or permanently and totally disabled ex-servicemen. H. R. Rep. No. 697, 80th Cong., 1st Sess.; S. Rep. No. 480, 80th Cong., 1st Sess.

we are constrained to define the term "ex-servicemen," for the purposes of this particular statute, as relating only to those who performed military service on full-time active duty with military pay and allowances, thereby dislocating the fabric of their normal economic and social life.[15] It thus becomes obvious that respondents' service with the Volunteer Port Security Force of the Coast Guard Reserve cannot qualify them as "ex-servicemen" entitled to veterans' preference under this enactment. They continued their normal civilian employment with the War Department and the Navy Department during the war, employment which suffered as little as possible from their military service; they served on active duty for only relatively short periods each week and could be disenrolled at

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[15] The view we take of this matter coincides with that expressed by the supporters of H. R. 1389, 80th Cong., 1st Sess. That bill proposed to amend § 2 of the Veterans' Preference Act by providing that "'active duty in any branch of the armed forces of the United States' shall mean active full-time duty with military pay and allowances in any branch of the armed forces during any campaign or expedition (for which a campaign badge has been authorized)."

Hearings were held before the House Committee on Post Office and Civil Service. The bill was unanimously reported out by the committee, H. R. Rep. No. 465, 80th Cong., 1st Sess., and was adopted by voice vote by the House of Representatives; 93 Cong. Rec. 7315–7318. A unanimous Senate Committee on Civil Service also reported the bill favorably, S. Rep. No. 396, 80th Cong., 1st Sess., but the Senate adjourned without considering the bill.

The proponents of the bill and the two committees considered it as a clarification of the original Congressional intent as to the meaning of "ex-servicemen." It was stated that the country owes a debt of gratitude to the temporary Coast Guard Reservists, "but they are not to be classed as ex-servicemen, who were actually uprooted from their civilian occupations and subjected to the rigors of full-time military training and combat. It is to the latter group that Congress intended to provide employment preference in Government service." 93 Cong. Rec. 7315. The need for clarification of § 2 was said to be the confusion created by the lower court decisions in the instant cases.

their own request; they received no military pay and very few allowances; they could not be transferred away from their homes without their consent. They were therefore able to retain the essential elements of their civilian life. As to them, there was no problem of reemployment or rehabilitation caused by their military service. They are not among the "ex-servicemen" whom Congress desired to assist by means of the Veterans' Preference Act.

One other matter remains. Respondents claim, and the Court of Appeals held, that they acquired vested preference rights under § 18 of the Act. In pertinent part, § 18 provides that "this Act shall not be construed to take away from any preference eligible any rights heretofore granted to or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof." It is said that the Civil Service Commission's ruling of April 4, 1944, extending preference rights under the then existing laws to those who had performed service with the Volunteer Port Security Force, gave respondents vested rights which were preserved by § 18 when the Veterans' Preference Act was subsequently enacted.

This contention is without substance. Veterans' preference rights by their very nature do not accrue until one has become a veteran through separation from the armed forces. On June 27, 1944, when the Veterans' Preference Act became law, neither of the respondents had as yet disenrolled from the Volunteer Port Security Force. In fact, respondent Hubickey had not even enrolled by that date. Thus they could not be classed as veterans or ex-servicemen, whatever definition be given those terms, on June 27, 1944, and they could not have earned any veterans' preference rights prior to that date. The Commission's ruling of April 4, 1944, did no more than inform respondents that they would be entitled to veterans' pref-

erence upon disenrollment, provided such ruling was lawful and still in effect. It did not purport to give them preference rights as of April 4, 1944, or to cause those rights to accrue before disenrollment. Since they did not possess and had not been granted any such rights under prior law, respondents were completely unaffected by the provisions of § 18. That section was primarily designed to perpetuate preferences granted earlier to veterans who had served in the armed forces during peacetime and who were then in government employment or on civil-service registers.[16] Respondents were obviously not veterans of that type.

Reversed.

MR. JUSTICE DOUGLAS dissents.

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[16] See S. Rep. No. 907, 78th Cong., 2d Sess., p. 2; H. R. Rep. No. 1289, 78th Cong., 2d Sess., p. 3. The Veterans' Preference Act does not grant benefits to future peacetime veterans.